AN INTRODUCTION TO COMMERCIAL LAW

BY THE SAME AUTHOR

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AN INTRODUCTION TO COMMERCIAL LAW

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PREFACE

THIS little book is not intended primarily as an examination text-book, though its contents cannot fail to be useful to students preparing for the various professional examinations in Commercial Law. Its first object is to explain to the layman who is studying any part of Commercial Law the nature of our English legal system, and some of the more important rules and principles which go to make it up. When a student has grasped these he can then proceed to study in detail what is required for his professional examination, or what is likely to be specially useful in his business. This may be the Partnership Act, the Bills of Exchange Act, the Sale of Goods Act, the Companies Acts, the Law of Bankruptcy, or some other well defined branch of the law.

The author has tested the value of much of the material here collected as a groundwork for further study by using it for introductory lectures, both for students of the University and business men of the City. He is under considerable obligations to various well-known legal treatises, and to a volume of collected lectures entitled "A Century of Law Reform."

FRANK TILLYARD.

BIRMINGHAM UNIVERSITY,
July, 1907.

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CHAPTER I

THE ENGLISH SYSTEM OF LAW

Statute law and Judge-made law—Common law—Judge-made law, advantages and disadvantages—Indebtedness of commerce to Lord Mansfield and others—Leading cases—Judge-made law comprises equity as well as common law—The distinction between them—Statute law—Courts of law.

Statute Law and Judge-made Law—Common Law.—There is no distinction more important than that between "the law" and "a law." When the term "law" is used it is quite natural to think of the product of the great law-making machine called Parliament. In the political world proposals and counter-proposals as to legislation excite far more interest than the administration of existing law. In our newspapers the reports of proceedings in Parliament occupy whole columns, while reports of proceedings in the law courts—other than in the *Times*, and except in cases of breach of promise and divorce—are fortunate if they get a few lines. Thus, Parliament

looms very large in the eyes of the public, while the law courts and the Judges are hardly noticed. But while Parliament makes laws, the Judges make law. The first point to grasp in even an elementary study of law for the purposes of commerce is that in England law comprehends very much more than laws made by Parliament. The common law—which means the law of the community—reaches back into a remote past far more ancient than Parliament. It may be roughly defined as rules of law known or assumed to have been already in existence before the earliest statutes now in force—at all events, not owing their existence to any known statute—and extensions of such rules introduced to meet new circumstances, and administered by courts of law as distinct from courts of equity. This common law is to be found in certain very old treatises which have an exceptional authority, and in some hundreds of volumes of reported cases, in each of which some infinitesimal part of a general rule is to be found embedded among the particulars of a more or less prolix narrative. The common law is therefore what is called Judge-made law. The system obtaining in France or Germany may be contrasted with this, for there the law has been "codified," or reduced to statute form. In England we sometimes speak of certain Acts of Parliament—*e.g.*, the Bills of Exchange Act, 1882—as though they constituted a partial code, but this is misleading. The Act in question summarizes a very large number of decisions of the courts prior to its enactment, and embodies a great deal of the common law on the subject of bills and cheques, but it does not comprise or purport to comprise the whole law, as a very simple illustration will prove. How, for instance, would commerce proceed nowadays except on the assumption that a banker is bound to honour

his customer's cheques so long as he has sufficient assets of the customer in his hands? But this fundamental obligation of the banker rests on a decision of the House of Lords sitting in its judicial capacity, and is not referred to in any way in the Bills of Exchange Act. That Act contains an elaborate definition of a cheque (or bill of exchange drawn on a banker and payable on demand), but is silent as to the banker's duty with regard to his customer's cheque. Thus, while our conception of what a cheque is rests on statute, our conception of how a cheque operates rests on the common law. In other words, in England, even where the law on particular subjects, such as bills of exchange, partnership, and the sale of goods, has been very largely embodied in particular Acts of Parliament, there is no real code.

Judge-made Law, Advantages and Disadvantages.—Judge-made law has some obvious advantages and disadvantages. Its chief advantage is its wonderful elasticity. In theory the rules of law applicable to a given set of facts exist somewhere, and if they cannot be found in any previous decisions (technically called precedents), then they exist in the brain of the Judge, and are forthcoming from him. It is idle to pretend that in these cases the Judge is not making new law. The law so made should be in harmony with rules already established, but cannot fail to be an extension of them. Take, for example, contracts in restraint of trade. It is a very old principle of the law that such contracts are, in general, bad in law, as being against public policy, but there are exceptions. It is allowable, for instance, to admit a partner, manager, or other servant into a business under a promise from him not to compete after he has left the business, if he fetters himself only so far as is reasonable for the protection

of the business. Suppose that this rule of law had been put into a statute a hundred years ago by means of a schedule of distances, so that a man who carried on business in London might take an agreement from his manager not to compete within sixty-five miles of London, with smaller radii from less important places. On the making of railways, the introduction of the penny post, and the invention of telegraphy, these reasonable limits would have become unreasonably small, and fresh legislation, with delay and inconvenience, would have been necessary. But as this rule is part of the common law, the Judges have been able to spin fresh rules to meet altered circumstances, and in Nordenfeldt's case,[1] where the business was selling Maxim-Nordenfeldt guns, it was held that, as the customers for the guns were Governments in every part of the world, a covenant not to compete in any part of the world might be reasonable. An actual example of a schedule very largely out of date may be found in the Housing of the Working Classes Act, 1890 (sec. 75), where the warranty as to the fitness of a house for human habitation depends upon a schedule of rents contained in a much earlier Act, so that in what are now highly rented districts, like Croydon and West Ham, the section only applies where the rent does not exceed three shillings. An up-to-date figure would be at least three times as much. In the Bills of Exchange Act there will be found several examples in which this elasticity is imported into the Act by the use of the word "reasonable." (See secs. 20, 36, 40, 45, 49, and 76.)

Manifest disadvantages of Judge-made law are its uncertainty and its inaccessibility to the layman. "With such a voluminous mass of reports, it is not

[1] *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, 1894, A.C., 535.

likely that the attention of the Judge will always be called to every precedent in point, and even if it is, he may easily fancy that he sees a distinction between two cases which his successors might fail to perceive; it is naturally not of infrequent occurrence that sometimes there should be apparently opposite precedents capable of being cited on either side." Even where a Judge is faced with a decision of a higher Court, which he is in general bound to follow, if he can draw a distinction between the case before him and the supposed binding precedent, he is under no obligation to apply it. A layman turned loose on a law-book written for the legal profession is almost certain to be disgusted or muddled with its distinctions, which he is apt to characterize as pettifogging. But the whole art of English common law consists in recognizing that one set of facts is in some essential particular distinct from another set of facts on which a decision has already been given, and therefore not governed by that decision; or is in all essential particulars the same as another set of facts, and therefore governed by the decision on that set of facts. The art of picking out the essence of a case often involves setting aside a lot of minor facts, and though a lawyer has to draw distinctions, yet, if he is a good lawyer, his distinctions will not be pettifogging.

Leading Cases.—To one Judge, Lord Mansfield, commercial law owes more than to many generations of the country's legislators. Lord Mansfield was Lord Chief Justice from 1756 to 1787. His biographer says of him and his times:

"In the reign of George II. England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion.

The Legislature had literally done nothing to supply the insufficiency of the feudal law to regulate the concerns of a trading population, and the common-law Judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine assurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports, which swarmed with decisions about lords and villeins, about marshalling the champions upon the trial of a writ of right by battle, and about the customs of manors. Mercantile questions were so ignorantly treated when they came into Westminster Hall that they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought in a court of law, the Judge submitted it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes."

Lord Mansfield changed all this by a series of carefully reasoned and mutually consistent decisions. For this purpose he did not hesitate to draw on outside sources, and one famous decision of his, which created the English law of bailments, was almost pure Roman law. The example of Lord Mansfield has been followed by many distinguished lawyers; and many of the decisions of the Court of Appeal and of the House of Lords, while nominally disposing merely of the question in dispute, do so on grounds so clearly and widely stated

as to settle a principle as well as decide a case. Thus, a case heard in the Court of Appeal[1] in 1873 drew a distinction between foreign negotiable instruments, such as bearer debentures of a foreign company, and English negotiable instruments, and decided that, while usage could introduce fresh foreign negotiable instruments, it could not add to the list of English negotiable instruments. In 1876 the House of Lords[2] was dealing with the negotiability of a foreign instrument — Russian Government Scrip—but based its decision on such wide grounds that it virtually overruled the decision of the Court of Appeal. The Court gave no countenance to the doctrine "that the law merchant is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce." Subsequent decisions of Courts of first instance based on this decision of the House of Lords have added bearer debentures of English companies to the list of negotiable instruments. In the same way a decision of the House of Lords[3] on the question of solicitation of customers after parting with the goodwill of a business, though raised in an action between partners, has settled the law on the point as between the vendor of a business and a purchaser from him.

These luminous decisions are known as "leading cases," and the study of them is an indispensable part of a lawyer's education.

Judge-made Law comprises Equity as well as Common Law—The Distinction between Them.—But there is another department of our law which is Judge-made—namely,

[1] *Crouch* v. *Crédit Foncier*, 1873, 8 Q.B., 384.
[2] *Goodwin* v. *Robarts*, 1876, 1 A.C., 476.
[3] *Trego* v. *Hunt*, 1896, A.C., 7.

equity. The distinction between common law and equity (often abbreviated to "law" and "equity") is not an easy one to explain. It is helpful to regard the distinction partly as arising from purely historical reasons, and partly as inherent in the subject-matter dealt with. A common-law action decided questions of fact once and for all, or questions of law, and had no administrative scope. For instance, suppose A claimed to be heir to a large estate. B, who was his younger half-brother, claimed that he was the heir on the ground that their father was never married to A's mother. Here the action between B and A would prove or disprove once and for all the legitimacy of A, and settle the right of succession to the estate in question. Or, again, suppose A claimed, on the death of his father, who died without having made a will, that he was solely entitled to his father's share in the New River Company, and suppose B, the only other child, claimed a half-share in this property. Here there would be a question of law as to whether the shares of the New River Company were "real estate" or "personal estate."[1] There would be no dispute as to the legitimacy of either A or B. The sole question would be what law was applicable to the facts. These are typical examples of common-law actions. But suppose a man died, having left his property to trustees upon trust to realize it and divide it amongst all his first cousins and such of the children of his deceased first cousins as should attain the age of twenty-one years, and the trustees found that there were numerous first cousins and children of first cousins scattered all about the world, and required the assistance of the Court in distributing the estate to the right persons. Here it might well be that there would be

[1] For an explanation of these terms, see Chapter XVI.

numerous inquiries to be made, intricate accounts to be taken, and a long and minute investigation of complicated details. For this the old common-law courts made no provision—in fact, they did not recognize trusts—and the trustees would have gone to the Court of Chancery, and nowadays would go to the Chancery Division, where machinery has been devised for dealing with matters of this kind. To a considerable extent, then, common law and equity are concerned with different matters, and differences in procedure are natural and inevitable.

Historically, the distinction between law and equity grew up in this way: A common-law action was begun by the issue of a writ of summons out of the King's Chancellery or Chancery. The Chancellor and his clerks were entrusted with the task of hearing and examining the petitions and complaints of plaintiffs, and giving them a remedy according to the nature of the injuries shown by them. Once the appropriate writ was issued, the Chancery lost control over the subsequent proceedings, and all questions upon the validity of the suit, and the pleadings it gave rise to, were determined by the Judges of the courts of law. The writs which the clerks of the Chancery were accustomed to prepare and issue, although numerous enough, became classified and rigid, as is the custom in judicial procedure. But while legal procedure was stiffening, civilization was progressing, society was becoming more and more complex, and new relationships between persons were growing up. Who was to supply remedies for new grievances? The common law was now too stereotyped to do this. So it came about that where there were no writs suitable to meet the cases presented to the Chancery by way of petition or complaint, it was then open to the Chancellor

and his clerks, if they found or thought that the common law was deficient, to issue their own subpœna[1] and reserve the case for hearing by the King in Council. It was out of this reservation that the jurisdiction of the Court of Chancery arose. From being an office for the issue of common-law writs, it became a court for the hearing of special classes of cases. When trusts (not in the commercial sense, but such trusts as are parts of many wills and deeds)[2] were invented and recognized, the Court of Chancery became very important. Besides the execution of trusts and the administration of estates, to which reference has been made, the Court of Chancery was chiefly concerned with mortgages, and the dissolution of partnerships, and the taking of accounts between partners.

The different view of a mortgage taken by courts of law and courts of equity will give us an apt example of the conflict which grew up between the principles of law and equity. A mortgage is a conveyance of property by a debtor (mortgagor) to his creditor (mortgagee) to secure the debt. The debtor covenants to pay the debt with interest on a day certain, generally in six months' time. The mortgage contains a proviso that if the debt is so paid the creditor will reconvey the property to the debtor. In law, on the passing of the appointed day, the property vested in the creditor. Equity said that

[1] A subpœna is a direction from a court to attend under penalty (*sub pœnâ*) in case of disobedience.

[2] A trust is constituted when property is handed over by the owner to another person (the trustee) on the understanding that the property shall be dealt with in a particular way, notwithstanding that in appearance the trustee may be in the position of an absolute owner. At first trusts were only honourable obligations. The earliest form of a commercial trust was the vesting of shares in companies in trustees for definite commercial ends.

such was not the real intention of the parties, which was that the debtor should be allowed to redeem the property even after the appointed day was passed. This was technically known as the debtor's equity of redemption. The view of equity has been thus expressed, "Once a mortgage always a mortgage," so that the property comprised in a mortgage is redeemable by the mortgagor until the mortgagee has himself become the owner under a decree of the Court for foreclosure, or has sold the property to a purchaser under a power of sale. Thus, equity in certain cases (*e.g.*, mortgages) mitigated the rigor of the common law in order to carry out the real intentions of the parties.

Equity also developed new remedies. In a common-law action a plaintiff was awarded damages, which the Sheriff levied for, or a plaintiff successfully claiming land was put into possession of it, but beyond this the Court did not move. The Court of Chancery in suitable cases decreed the *specific performance*[1] of a bargain as an alternative to giving damages for its breach, and protected a trade-mark or a patent from violation by the issue of an *injunction* to the offender to desist from his violation. Disobedience was treated as contempt of court and punished by imprisonment. An injunction is a very powerful remedy, and the issue of injunctions enabled the Court of Chancery to stop persons from bringing actions at law, when such proceedings were contrary to the equity of the case.

After a time the principles and procedure of equity became as fixed as those of law. The duality of

[1] A simple example may be better than a definition of this term. A contracts to sell his house to B. When the time comes for A to convey the house he refuses to do so. A can be compelled to convey the specific house he has agreed to sell to B, and this is called specific performance of the contract.

English law, and the conflicts between law and equity, were burdensome, if not somewhat disgraceful, and were put an end to by the Judicature Act, 1873, which enacted that where the rules of law and equity conflict, equity shall prevail. At the same time, one Supreme Court of Judicature was constituted, with separate divisions for common-law work (King's Bench Division) and equity or Chancery work (Chancery Division). But either division can give whatever remedy is most appropriate. Though the conflict is at an end, it is still necessary for the law student to read "equity" as well as "law," and it is impossible to write about commercial law without some reference to equity and equitable remedies.

Statute Law.—Now that we have seen that important parts of our English legal system—common law and equity—exist independently of statute law, it is time to consider the place of statute law in our legal system. Legislation in England is in the hands of Parliament, and as we have no written constitution, the power of Parliament is supreme. It has been said that an Act of Parliament can do anything except turn a man into a woman, and, subject to natural limitations, Parliament can pass any law it pleases, and is not bound by its previous Acts. Even Acts such as the Act of Union between England and Ireland, which from one point of view are of the nature of treaties, are not binding on future Parliaments. It is, therefore, within the power of Parliament to nullify the decisions of the courts of law. Thus, a short Act of Parliament was passed in the Session of 1906 to reverse the decision of the House of Lords in Gordon's case,[1] and was confined to that one object. Another Act (the Labour Disputes Act) has restored trade unions to the position which they were

[1] *Capital and Counties Bank* v. *Gordon*, 1903, A.C., 240.

supposed to occupy before the judgment of the House of Lords in the Taff Vale Case. But while Parliament is supreme in legislation, the courts of law are the interpreters of the meaning of Acts of Parliament, and construe them strictly according to their wording, and apart from any extraneous knowledge of their intention as expressed in Parliamentary debate. No more striking instance of this can be found than the recent decision of the Court of Appeal (afterwards reversed in the House of Lords) on the Education Act of 1902. The intention of its authors to put the expense of denominational instruction on the rates was notorious, but the Court of Appeal failed to find within the four corners of the Act a legal expression of such intention. When an Act of Parliament has been the subject of a judicial decision, the law then becomes the statute plus the Court's decision. In France, where the law has been codified, and where precedents are not binding, the code, and the code alone, is the law. In England it would be of little use for a man to read such an Act as the Workmen's Compensation Act, 1897, without a summary of the numerous decisions which have been given on its meaning. Fortunately, the three most important Acts with regard to commercial subjects—viz., the Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act—are so well drafted that the decisions on them have been comparatively few and of small importance.

Courts of Law.—We may finish this division with a slight sketch of our courts of law. The first distinction to be drawn is between courts whose jurisdiction is not fettered and those subordinate courts to which a limited jurisdiction has been expressly assigned. The normal court in which to bring an action is the High Court of Justice in London. It is subdivided into three divisions: the

King's Bench Division, which is the successor of the old common-law courts, and also takes bankruptcy work, and has a special commercial court; the Chancery Division, which is the successor of the Courts of Chancery, and also takes applications for winding-up companies and other similar cases; and the Probate, Divorce, and Admiralty Division, whose business is indicated by its title. These are courts of first hearing, and cases are heard by a single Judge; and if no appeal is entered against the Judge's decision, the action is at an end. If there is any novelty in the point decided, the case is reported, and can be used as a precedent in the decision of subsequent cases. If there is an appeal from the decision, the case is argued again in the Court of Appeal, which sits in two divisions, and, as a general rule, with three Judges in each division. These Judges are chosen from the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce, and Admiralty Division, and five Lord Justices of Appeal. A final appeal can be made to the House of Lords sitting in its judicial capacity.

As an alternative to the High Court of Justice in London, civil cases can also be heard at the assizes. The Judges of the High Court go on circuit, and sit at certain important provincial towns to try criminal cases, and a certain number of civil cases are also heard by them at the assizes.

Before the establishment of our modern county courts, except in the most trivial cases, there were only these two alternatives: the plaintiff must either take his case to London or the nearest assizes. London meant a serious journey and much expense; the assizes meant a considerable time of waiting, and possibly also some journeying, and, further, a much smaller selection of

counsel. Jeremy Bentham, to whom English law reform ultimately owed so much, had a dream of a local court within half a day's journey of every individual, dealing out every kind of justice, and accessible every day of the year and every hour of the night. Our modern county courts do not fall very far short of this dream. They were first established in 1846, with a jurisdiction in common-law cases where the amount in dispute did not exceed £20. By successive steps this limit has been raised to £100. In equitable matters they have jurisdiction where the subject-matter of the dispute does not exceed £500 in value.

County courts other than metropolitan county courts have jurisdiction in bankruptcy and also in company winding-up, if the registered office of the company is within the jurisdiction of the court and the paid-up capital does not exceed £10,000. Where it is a matter of convenience from their situation, county courts have been given a limited jurisdiction in Admiralty matters. Actions under the Employers' Liability Act, 1880, and proceedings under the Workmen's Compensation Act, 1906, must be brought or commenced in the appropriate county court, irrespective of the amount claimed. Appeals from the county court are heard in a divisional court of the High Court of Justice before at least two Judges, and their decision is final, unless leave is given by the Court to carry the case further.

There are now more than 500 county courts, grouped into 54 circuits and served by 54 Judges.

CHAPTER II

THE NORMAL LEGAL PERSON

English law deals with individuals—Legal persons of different capacities—The normal person—A man and his trade name—A man's duty to his creditors—The statute of Elizabeth—The Bankruptcy Act, sec. 47—Nationality—Domicil.

English Law deals with Individuals.—English law is based on the responsibility of individuals for their actions. It recognizes individuals, and not groups of persons, such as "committees," or even "firms," and most certainly not abstractions, such as "a business." Thus, if William Jones carries on the business of a draper in a shop under his own name, a milliner's business under the name of Madame Carnot, and an undertaker's business in partnership with Tom Smith, under the name of Henderson Brothers, the person who can be sued for the debts of those businesses is William Jones. William Jones is a legal person; Madame Carnot is not a legal person; and, with certain exceptions for purposes of convenience, Henderson Brothers have not the attributes of a legal person. If a creditor of William Jones, who has supplied £100 worth of goods to the draper's shop on credit, gets judgment against William Jones for £100 and costs, execution can be levied at the shop, or at Jones's private

house, or the millinery establishment, and Mr. Jones's interest in the partnership can also be made available for its satisfaction.

English law has consistently refused to deal with groups of persons, except (*a*) as an aggregation of individuals, all liable individually for the actions of the group or of the other members of the group, as in partnership, which is, after all, not an exception to the principle enunciated, but only an application to it of the rules of principal and agent; and (*b*) as a fictitious person, with a legal identity distinct from that of the members of the group. A group so treated becomes an individual by incorporation, and is known as a corporation.

There have been attempts, as in the case of the earlier joint-stock companies or large statutory co-partnerships, to create something lying between an individual and a corporation; but the Companies Act, 1856, and the Act now in force, the Companies Act, 1862, definitely abandoned the half-way house, and went the whole distance of incorporation, subject to certain provisions as to a shareholder's liability. The weakness of the Taff Vale judgment, which caused such commotion in the trade union world, was that it suddenly treated a group of persons—viz., a trade union, having none, or very few, of the attributes of a legal personality —as if they were a corporation.

The order in which we shall address ourselves to the law of persons will be (*a*) individuals of full and limited capacity; (*b*) individuals as principal and agent; (*c*) individuals as partners; and (*d*) corporations, and more especially incorporated trading companies.

Legal Persons of Different Capacities.—A legal person is an entity with which legal relationships can be established. The word "entity" is convenient because it

covers corporations, which are not natural persons, having, as a celebrated lawyer said, neither bodies to be kicked nor souls to be damned. But a legal person may have very varying degrees of capacity for entering into legal relationships. A baby of a few months old may be legally the owner of enormous estates, but the baby obviously cannot manage them or deal with them in any way. On the other hand, a railway company may have powers of acquiring land which the ordinary individual has not, and yet be very restricted as to its trading capacity, being, for instance, without legal power to manufacture and sell boots and shoes. In quite a recent case a railway company was held to have a very limited power to run omnibuses to and from a station.

Without attempting anything in the nature of a scientific classification, we may point out some of the more obvious kinds of legal capacities. A man may own and dispose of property; he may bind himself by agreements or, in legal phraseology, may become a party to a contract; or he may enter into such family relationships as marriage and fatherhood. As students of commercial law, we need not concern ourselves much about family relationships, but in dealing with infants and married women and settlements, which we shall have to touch on, these relationships are material. We shall have something to say about the power to own and dispose of property. This is a fundamental capacity, and, so far as the greater part of commercial law is concerned, quite simple in character. Therefore it will not engage nearly so much of our thoughts as the power to make contracts, but we must never forget that the power to make a commercial contract presupposes some ownership of property. You cannot even send the office boy by the tram-car to deliver a message until

you have made him the owner of a penny. The boy, by getting on the car, contracts to pay for his journey, but to enter into this bargain without property is a hazardous course. In the same way a man who goes into business without any capital does not make a very promising start. Therefore we must not think of the commercial man as a mere bargain-maker, but as a man acquiring and disposing of property.

The Normal Person.—The normal person can be better described than defined. Such a person may be either a man or an unmarried woman of full age and mental capacity. If for simplicity we dismiss the unmarried woman, we may say that he can buy and sell freely, own property of all descriptions, and borrow without any other limit than his credit. He can be sued for his debts, and, subject to the exceptions contained in the bankruptcy laws, the whole of his property, including in some cases his past property, can be made available for their payment. Broadly speaking, he can carry on business without any restriction other than such as is contained in the general law of the land. In the commercial world, as in the political world, the normal position is that of an unrestricted and unfettered man pulled up when he hurts other people, but otherwise free of governmental or other regulation. A man can trade as he likes so long as he does not interfere with the rights of others.

A Man and his Trade Name.—The alleged right of a man to trade in any name he may choose will furnish us with a practical example. This saying is just as true and just as untrue as to say that a man in England may say anything he pleases. We have the right of free speech and liberty of the Press in England, but still a man must not say things to the injury of other people.

There are no arbitrary limits to our liberty of speech, but there is a law of libel. In the same way, a man's general right to trade under any name he may choose is not subject to any arbitrary limitations, but is subject to objection at the instance of other persons who may be injured by the use of the particular name he has adopted. The following passage is taken from a judgment of Sir George Jessel:[1] "As the law originally stood, I think that any person might use his own name for the purpose of trade, and might use any fancy name for the purpose of trade. If a man's name was Brown or Jones, he was not compelled, according to the common law, to carry on trade under the name of Brown or Jones, but might carry on trade under any fancy name he chose, and the mere fact of somebody else having the same name, and carrying on trade under that name, does not prevent another person from doing the same. If John Brown sells coals, another John Brown may sell potatoes, and there is no law that I know of to prevent him from selling his potatoes under the name of John Brown. The first John Brown could not in such a case restrain the second John Brown from carrying on trade under his own name. Again, nothing can be plainer than that if the first John Brown carried on business under the name, not of John Brown, but of John Brown and Co., so might the second. What the law did prevent was fraud, and it prevented not only actual fraud—that is, fraud intentionally committed—but it also prevented a man from carrying on business in such a way, whether he knew it or not, as to represent that his business was the business of another man. And it might happen that the mere using of a well-known fancy

[1] *Merchant Banking Co. of London, Ltd.*, v. *Merchants' Joint-Stock Bank*, 1878, 9 Ch.D., 563.

name would be evidence of an intention on the part of a person using it to commit a fraud. One can well understand a certain name being so attached to a business as to indicate that business, and that business alone, and that another man using the same fancy name in carrying on a similar business ought to be convicted of an intention to defraud from that circumstance alone. That might well be; but still, after all, it is merely a question of evidence. Now, we have had the question before the courts of equity over and over again. There is the well-known case of *Croft* v. *Day*—the case of Day and Martin, the blacking-makers in Holborn—in which there was no longer either a Day or a Martin, as in the original firm, both being long since dead, and the persons before the Court, who then carried on their business, deriving title under them, were held entitled to restrain a real 'Day' and a real 'Martin' from trading under the name of Day and Martin as makers of blacking, because it was a manufacture of the well-known firm of 'Day and Martin,' the reason for the injunction being that the name of Day and Martin had been adopted for the purpose of representing and holding out to the public that it was the old firm of 'Day and Martin.'"

And the same rule applies to companies. A new banking company or a new insurance company which tried to get business by imitating the name of a well-known company would soon find itself pulled up by an injunction.

A Man's Duty to his Creditors.—There is one restriction of much wider application, which it will be worth our while to discuss in some detail. It is this, that in general a man is not allowed to put his property out of the reach of his creditors. This rule does not apply to

what his friends may choose to give him. Thus, if a man is known to be a spendthrift, or to be engaged in a hazardous or speculative business, his friends need not leave or give him property, and his intended wife need not settle property on him by marriage settlement so that his creditors can touch it. They can give him a modified life interest by what is known as a bankruptcy trust. The income is given to him for life, or until he assigns the income or becomes bankrupt, with a provision that, on any of those events happening, the trustees may use the income for either the man or his wife or children or other persons interested under the settlement. But the trustees must have a real discretion under which they can deprive the man of the income, for if they are bound to pay him the income, then the creditors can step into his shoes and demand it. You will see that in such a case the man has never had an interest which he has put out of the reach of his creditors. But a man cannot deal in this way with his own property.

The Statute of Elizabeth.—You will remember that Ruskin put on his father's tombstone, as his highest word of praise, that he was an entirely honest merchant. This is a somewhat rare virtue, and English law has for some hundreds of years found it necessary to protect creditors against dishonesty, and as early as the reign of Elizabeth (1573) an Act was passed, which is still in force, to the effect that the parting with lands, goods, and chattels for the purpose of delaying, hindering, or defrauding creditors is to be void against the creditors, unless made in return for a valuable consideration[1] and

[1] 'Consideration' is the technical term for the return which a man bargains for who makes a promise or parts with property otherwise than gratuitously (see Chapter XII).

in good faith to a person who does not know that the transaction may possibly be a fraud on the creditors. The first point to note is that the transaction, to be within the exception, must be made both in return for value and in good faith. The giving of value in return is not itself sufficient. The following is an instance cited from a very early case on the statute: "If a man be indebted to five several persons in the several sums of £20, and hath goods to the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bonâ fide* within the said proviso, for the proviso saith on good consideration and *bonâ fide*, so a good consideration does not suffice, if it be not also *bonâ fide*."

Marriage is in general a good consideration for the settlement[1] of property, but even a marriage settlement is void under the statute we are considering where the intention of the parties is to defraud or delay creditors, and the marriage is merely part of a scheme, in which husband and wife are both implicated, to protect the property against the claims of creditors.

In the case of a voluntary settlement—*i.e.*, a settlement made without the settlor receiving anything in return—the following rule has been laid down as to the circumstances under which such a settlement can be set

[1] 'Settlement' is the technical term for a deed (or certain clauses of a will) which 'settles' or determines the devolution of property from one person to another during a period of time to which the law has set strict limitations.

aside by creditors: "It is not necessary, in order to set aside a voluntary deed, that the settlor should be in a state of insolvency. The principle now established is this: The language of the Act being that any conveyance of property is void against creditors if made with *intent* to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor was to defeat, hinder, or delay his creditors. If a man makes a settlement with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside."

In one case[1] a solvent man who was not then a trader made a voluntary settlement upon himself for life, determinable upon his bankruptcy, with further trusts for his wife and children. Thirteen years afterwards he embarked in trade, and became bankrupt, and the settlement was set aside as fraudulent on its face.

The Bankruptcy Act, Sec. 47.—Experience showed that these cases occurred with considerable frequency in bankruptcy, and that it would avoid much litigation if some hard-and-fast rule were applied, leaving, in cases not covered by the rule, the law as it stands under the statute of Elizabeth. The Bankruptcy Act, 1883, sec. 47, sub-sec. 1, enacts as follows: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration (or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife), shall, if the settlor becomes bankrupt within two

[1] Ex parte *Stephens*, 3 Ch.D., 807.

years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Nationality.—So far we have made the assumption that our normal person is a British subject living in England; but we shall not get a complete view unless we consider, at any rate briefly, two other attributes of a person—namely, his nationality and his domicil. By a man's nationality is meant that political relationship which exists between him and the sovereign State to which he owes allegiance. Nationality must be distinguished from race. By the common law nationality depends, not on race, but on birth within the King's realms. Thus a Maltese Jew is not an alien, but a Portuguese Jew is an alien. A Chinaman born in Singapore is not an alien, while one born in Canton is. By statute law the children and grandchildren of English parents born out of the King's allegiance stand on the same footing as if born in England. Nationality has not so much importance in English commerce as it once had, for up to 1870 no alien could own real estate in England, or take a lease for longer than twenty-one years. The only disability now attaching to an alien is that he cannot hold a share in a British ship. In some of the United States of America the rules against holding real property still survive. In foreign

countries, too, there are often restrictions against companies not registered in the country holding property, and English companies that wish to have foreign branches have in many instances to form local companies, and control them through holding the shares.

Provision is now made by the Naturalization Act, 1870, for the granting of certificates of naturalization to aliens, and for certain persons—*e.g.*, subjects of other States born within British dominions—ridding themselves of their British nationality by a formal declaration of alienage.

Domicil.—A further complication arises from the fact that both within and without the British dominions there are a great many different systems of law in force. English law is not the same as Scotch law; the law of the Indian Empire is not the same as the law of New Zealand, and so on. Then, again, aliens are of many different nationalities, governed by different systems of law. Does the Scotsman carry his law about with him if he comes to trade in England, or what happens? These and similar questions inevitably arise. A little thought will show that the kinds of law which can conceivably be applied to a given transaction are either "place" law or "personal" law. Thus, suppose A, an Englishman, sells a piece of land in Scotland to B, another Englishman, while A and B are both resident in Dublin, and a dispute arising out of the sale afterwards occurs when both A and B have emigrated to Canada. Now, there are three different "place" laws which could be applied to the settlement of the dispute—viz., (*a*) the law of the place where the land actually is, *i.e.*, Scotch law; (*b*) the law of the place where the bargain was made, or Irish law; and

(*c*) the law of the place where the dispute is being tried, or Canadian law. There are also two "personal" laws which could conceivably apply—viz., (*a*) English law, the parties to the dispute being Englishmen when they made their bargain; and (*b*) Canadian law, if they have become Canadians. It will be seen that case (*c*) of the "place" law and case (*b*) of the "personal" law give the same result, and the reason why we do not hear a great deal about the conflict of laws is that in most disputes there is only one "place" law applicable, and only one "personal" law applicable, and they both give the same result.

In a book of this sort we can only deal with this matter very slightly. As a working rule we may say that a person carrying on business in England need concern himself with nothing but English law, unless (*a*) he is dealing with land situated out of England, in which case his dealing is governed by the law of the place where the land is situated; and (*b*) the question involved is the disposition of movable property belonging to a person not a domiciled Englishman, in which case the owner's "personal" law applies. The technical term for a man's "personal" law is the law of his domicil. The following is a strict definition of that term: "The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by rule of law."

Let us now take a practical illustration. A, a person with his permanent home in France—*i.e.*, with a French domicil—dies in London without having made a will. He has in London household furniture and money at a bank. The distribution of such property is

regulated, not by the law of England, but by the law of France applicable to persons in A's position. If the bank manager pays out A's balance to a person entitled to it according to English law, but who is not entitled to it according to French law, he can be made to pay over again. Similar difficulties sometimes arise in bankruptcy, where the bankrupt is domiciled in one country and has movable property in another country.

CHAPTER III

INDIVIDUALS OF LIMITED CAPACITY: MARRIED WOMEN —INFANTS

Married Women: Common-law rule—The equitable doctrine of separate use—Legislation (Acts of 1870 *and* 1882)—*Restraint on anticipation—Wife as husband's agent—Infants: Definition — Contracts for necessaries — Other contracts—Infants' Relief Act,* 1874—*Trading contracts—Contracts of service—Implied ratification—Right of infant to recover money paid—Position of infant's parents.*

Married Women: Common-Law Rule.—By the common law, on marriage husband and wife became one, but, instead of their forming, as husband and wife, a legal personality distinct from either the husband or wife, the legal union was effected by the husband absorbing almost the whole of the wife's property and rights. "A century ago a married woman was, in legal text-books, the associate of idiots and lunatics; she was, generally speaking, as incapable of enjoying rights over property, or creating rights by contract, as her own infant children."[1] The rules of the common law were too rigorous to prevail in a modern community, and equity devised a means of settling property on a married woman, so that she should have the benefit of it independently of her husband.

[1] "A Century of Law Reform," p. 342.

In order to do this, equity protected the wife's enjoyment (*a*) by intervening on her behalf when property was given to her "for her separate use," and (*b*) by allowing her separate property to be held by her, "subject to a restraint on anticipation," when so expressed in the instrument which gave her the property. These two equitable doctrines may be considered separately.

The Equitable Doctrine of Separate Use.—Suppose the father of a married woman left her by his will a legacy of £1,000. Her husband could, at common law, demand the legacy from the executors, and do what he liked with the £1,000. When, however, a testator left £1,000 to a married woman for her separate use, the courts of equity compelled the trustees of the legacy to obey the directions of the wife, and not of the husband, thus virtually making the married woman the owner of the £1,000. If the legacy was left direct to the wife, without any trustees, the courts of equity compelled the husband to hold the property in trust for his wife for her separate use. This interference by the courts of equity applied to gifts of any sort—land as well as money—made for the separate use of a married woman.

But even when a married woman had "separate property," she did not become a person of full legal rights. Her engagements only bound her separate estate, and did not bind her personally. If she ran into debt to the extent of £1,000 on the strength of £500 separate estate, and before her creditors obtained judgment she had parted with the £500, then her creditors had no remedy, as her separate estate was gone, and they had no personal remedy against her; and if she subsequently received further property, this property was not available for her past debts. This

state of the law was fairly satisfactory for a married woman whose friends were able to get legal advice, and settle property for her separate enjoyment in due legal form; but it left other married women, and especially married women who earned their own livings, completely at the mercy of their husbands.

Legislation (*Acts of* 1870 *and* 1882).—If, when the Legislature, in 1870, first dealt with this matter, it had been prepared to put men and women on an equality, it would have been a simple matter to have abolished both the common-law superiority of the husband and the equitable protection of the wife; but Parliament was, as usual, anxious to deal with the subject in a tentative way, and so merely extended by statute the scope of the wife's equitable protection. Under the Married Women's Property Act, 1870, a married woman's earnings became her "separate property," and other advantages were given her, but all on the lines of securing this property for her personal enjoyment by regarding it as given to her for her separate use. The Married Women's Property Act, 1882, which is still in force, though it sweeps away all the husband's marital rights if the property is acquired or the marriage solemnized after January 1, 1883, yet does this by making all the property of a wife her separate property. Her contractual capacity is limited to the extent of her free separate property, and, as she has no personal liability, she cannot be committed to prison if she has means to pay and will not pay, as an ordinary debtor can be. But one consequence of the Legislature having based its protection of married women on the equitable doctrine of "separate use" is that it naturally left untouched what equity had grafted on to the separate use—viz., the power to enjoy property subject to a restraint on anticipation. This enables a

married woman to defeat her creditors in a way that is not possible to a man, and we must now proceed to explain "restraint on anticipation."

Restraint on Anticipation.—The simplest way to understand restraint on anticipation is to consider a life interest. A man who is entitled to a life interest, say, in a sum of money invested in Consols is entitled each dividend day that he is alive to receive the dividends. He may anticipate these dividends before they become due by selling or mortgaging his right to receive them, and if he takes out a life-assurance policy, he will find it an everyday matter to raise money in this way. If he becomes bankrupt his creditors can claim the life interest, and can sell to a purchaser the right to receive the dividends during the rest of the bankrupt's life. If a man attempts to settle his own property so that he is restrained from anticipating it, this is calculated to delay, hinder, and defraud his creditors, and can be set aside, and, as already explained, the only valid way of protecting a man from his own imprudence is for a third person to settle property on him on "bankruptcy trusts."

A great equity lawyer, who was anxious to protect a married woman on the occasion of a life interest being given to her for her separate use, hit upon the device of inserting words to restrain her from anticipating the income, and the courts of equity upheld the validity of the restriction. This device was intended to protect the woman from pressure from her husband when he was in difficulties with his creditors; but nowadays its chief effect is to protect her from her own creditors. A married woman may, upon her marriage, settle her own property upon herself, subject to this restraint. It can be made to apply, not merely to life interests, but to

the actual property itself. A married woman who has property settled upon her subject to a restraint against anticipation cannot deal with the capital or the future income of it, but only the income actually in her hands, or due to her from the trustees, and her creditors' rights are limited in the same way. Thus, when judgment is obtained against a married woman, payable out of her separate estate held in trust for her without power of anticipation, income accrued due after the date of the judgment cannot be attached in the hands of the trustees to answer the judgment. Lord Macnaghten explained, in a recent case,[1] that if this were not the rule, "those who had ministered to her extravagance would find a security in a judgment against her of an anticipatory character, swooping down upon her property from time to time, as and when received, and so the restraint on anticipation would be of no avail."

The Married Women's Property Act, 1882, leaves untouched this power of a married woman to enjoy property subject to a restraint on anticipation. It is therefore necessary before credit is given to a married woman to make sure, not only that she has separate property, but also that it has not been settled upon her subject to restraint on anticipation. There is no doubt that the survival of the restraint on anticipation is an anomaly. Now that a married woman can enter into all sorts of commercial and professional positions, it creates fresh difficulties. She may be possessed of great wealth secured to her in this way, and may enter into business dealings under the guidance of a husband who is himself a bankrupt; but however much credit she obtains, her creditors cannot touch her property. In the long-run, the commercial credit of married women must suffer.

[1] *Bolitho* v. *Gidley*, 1905, A.C., 98.

Wife as Husband's Agent.—No account of a married woman's position will be complete without some explanation of her position as her husband's agent. Her authority to pledge his credit is usually classified as express, implied, or ostensible. There is no difficulty about an express authority. A husband sends his wife to the jeweller's with a note asking the jeweller to let her have any diamond ring she may choose up to the value of £50. The husband is clearly liable for the price of a ring so chosen.

If husband and wife are living together, the wife has an implied authority to pledge his credit for necessaries arising out of the husband's legal duty to support her. Necessaries may be defined as food, clothes, household utensils, etc., on a reasonable scale, having regard to the husband's position, or apparent position. If a wife orders such necessary articles, it will be implied or presumed that she has her husband's authority unless the contrary appear. This may appear in more than one way—*e.g.*, if the husband warns the tradesman not to give credit, or if he makes his wife an allowance for necessaries and forbids her to pledge his credit. In the latter case, notice to the tradesman of the husband's allowance is immaterial. Suppose, for instance, that a man in the middle classes allows his wife £3 a week for housekeeping, and instead of using it for that purpose she loses it by playing at bridge. She then goes to a tradesman, with whom she has not dealt before, and obtains groceries on credit. The tradesman cannot make the husband pay, as his liability can only be implied from his legal duty to support his wife, and that duty has been fulfilled by his allowance.

The ostensible authority of a wife to pledge her husband's credit depends on previous acts of the husband,

which go to establish her authority, and such authority continues until the husband revokes it, and communicates his revocation to people entitled to act on it. Such authority is an example of the principle of "holding out" or "estoppel," as to which more will be said hereafter. Thus, if a wife orders goods on credit, and the husband pays for them, he holds her out to that tradesman as having authority to pledge his credit; and to prevent her from pledging his credit again, he must warn the tradesman.

Infants.—An infant is a person of either sex who is under twenty-one years of age. Many of the disabilities of an infant will be known to my readers: he cannot be a Member of Parliament or be enrolled as a burgess, and so on; dispositions of his property are, in general, voidable. Thus, he cannot part with land so as to deprive himself of the right to set the transaction on one side when he is of age. But it is not necessary to dwell on his limitations as the owner of property, because if it is of any value he is certain to have a guardian of his property, or, on proper proceedings being taken, the Court will act as his guardian and treat him as a Ward of Court. In the matter of contracts an infant has necessarily much greater freedom of action, and the law has laid down stringent rules for his protection.

Contracts for Necessaries.—An infant has power to pledge his credit for the purchase of necessaries, and must pay a reasonable price for them. The term "necessaries" has recently been defined by statute. Sec. 2 of the Sale of Goods Act, 1894, says that necessaries "mean goods suitable to the condition in life of such infant, and to his actual requirements at the time of the sale and delivery." As was said in one

case:[1] "It is not enough to say that the article in question is one of a useful class, for most articles might at least be used for necessary and becoming presents. Again, food is a necessary, but a daily dinner of turtle and venison would not be a necessary for a clerk with a salary of £1 a week. A threepenny ride in an omnibus on a wet day may be necessary for such a clerk, and save him its cost by saving his clothes, but there could be no question about a coach and four . . . evidence is also admissible to show that the infant was supplied with similar articles. Suppose a baker delivered 100 loaves daily to an infant who could only consume one, would he be liable for the price of the other 99? Certainly not, because they were not necessaries. But what difference does it make on this question that they are supplied by one baker or a hundred?"

Other Contracts.—As to things not necessaries, the rule of the common law was that a contract—provided it was for the infant's benefit—was not absolutely void, but was only voidable, and could be ratified by him after he was of age, although he received no fresh benefit in return for his ratification. The Infants Relief Act, 1874, has largely modified this rule. The first section of that Act makes three classes of contracts absolutely void when made with an infant, of which we may notice two—viz.:

(1) Any contract for the repayment of money lent or to be lent.

Thus, an overdraft at a bank, which is in law a loan from the banker to his customer, is irrecoverable if the customer is an infant; and

(2) Any contract for goods supplied or to be supplied other than necessaries.

[1] *Ryder* v. *Wombwell*, L.R., 4 Ex., 32.

But even an infant's voidable contracts do not now admit of ratification, as the second section of the Infants Relief Act enacts "that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Trading Contracts.—It is not illegal for an infant to engage in trade, but it is not a necessity for him to trade on his own account, and he cannot be sued on his trading debts, nor on contracts made by him for the purpose of carrying on a trade. He cannot be sued for the rent of his business premises. It follows from the fact that trading debts are not binding on an infant that he cannot be made bankrupt in respect of them.

Contracts of Service.—Contracts of service stand on a different footing. An infant not of tender years has usually to earn his living, and a contract by which he gets employment, which as a whole is beneficial to him, is binding on him. Thus, an infant may, as part of a bargain for employment, undertake not to compete with his employer within a reasonable distance of his employer's place of business, and for a reasonable time after leaving his employment. An infant cannot be sued on a covenant to serve in a deed of apprenticeship, and for that reason his father or guardian generally enters into such a promise on his behalf. Where the premium does not exceed £25, or there is no premium, the magistrates can, under the Employers' and Workmen's Act, 1875, hear disputes between masters and apprentices, and can order an apprentice to serve in accordance with the provisions of the apprenticeship agreement.

Implied Ratification.—Where an infant has acquired property of a permanent character (*e.g.*, land or shares in a company) to which obligations are or may be attached, such as the payment of rent, or the payment of calls on shares, then, unless the infant repudiates the agreement either before he has come of age or within a reasonable time thereafter, ratification is implied, and without any express ratification he may be held subject to the liabilities of his position.

Right of Infant to recover Money paid.—An infant's right on avoiding a voidable contract to recover money paid by him under it seems to depend upon whether the parties can be put back into the same position as before the contract. Thus, an infant shareholder was allowed to repudiate shares on which no dividend had been paid, and to prove in the liquidation for the amount paid up on the shares. But an infant who had hired a house, and bought and used the furniture in it, could not recover back part of the price of the furniture which had been already paid, although the contract was void under the Infants Relief Act.

Position of Infant's Parents.—A contract with an infant does not give the creditor any rights against the infant's parents, whether the contract is for necessaries or not. The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child. A parent is only liable when the child is contracting as an agent for the parent, and not as a principal.

CHAPTER IV

PRINCIPAL AND AGENT

Definitions and general rules—Powers of attorney—Other forms of authority—Agency by holding out—Authority assumed by agent—Authority from necessity—Extent of authority—General and special agents—Factors—Brokers—Commission agents — Del-credere agents — Agent's position—Warrant of authority—Revocation of authority.

Definitions and General Rules.—So far we have been considering our legal persons as acting entirely by themselves, and as being self-sufficient for their necessary legal actions. But we know that in real life this is not so. We send the servant to fetch a cab, we employ a traveller to sell our goods, we write to our brokers to invest our moneys, and so on. In law a person who acts in the place of another is called an agent, and the person on whose behalf he acts is called the principal. The colloquial use of the term "agent" is somewhat different, and must be put out of our minds. A shopkeeper who describes himself as agent for the sale of Timbuctoo Tea is most probably a principal selling on special terms, and not an agent at all.

There are two very simple but most important general rules which may be laid down as to agency. The first is that, with certain exceptions, "whatever a

man *sui juris* [*i.e.*, the normal person of our second chapter] may do of himself he may do by another." In other words, a man may in general act through an agent. The second rule is the complement of this—"the acts of the agent are the acts of the principal." This is concisely expressed in the Latin sentence, "Qui facit per alium, facit per se" (He who acts through an agent is himself acting).

Many examples might be given of these general rules. In one case[1] C verbally authorized O to sign on his behalf the memorandum of association of a company. O accordingly signed C's name to the memorandum without his own name appearing. When the company was being wound up C disputed his signature and the consequent result of membership. The Court held that, as there was nothing in the Companies Act, 1862, to show that the Legislature intended anything special as to the mode of signature of a memorandum of association, the ordinary rule applied that signature by an agent is sufficient. The Bills of Exchange Act follows the general rule, and expressly enacts (sec. 91) that where any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

These rules apply to all sorts of actions, and are not limited to contracts. Property may be transferred through an agent, and, as probably all my readers know, powers of attorney are regularly used for the transfer of Consols in the books of the Bank of England. In other words, the owner of the Consols transfers them through his attorney or agent.

[1] In re *Whitley Partners, Ltd.*, 1886, 32 Ch. D., 337.

In other cases there may be involved the power to do something of importance which can be better done through an agent than personally. In a recent case[1] it was the right of a sleeping partner in a brewery to inspect the accounts of the brewery, and ascertain through the services of a skilled valuer the real value of his share in the brewery. The other partner asserted that this was a right personal to the sleeping partner, and must be exercised by him in person if at all. He replied that such a right was valueless to him, as he was not an expert in accounts. The Court held that he was entitled to act through a skilled valuer upon the valuer undertaking not to use the information he acquired for any other purpose than to advise his principal. In other cases, again, it may be a question of damage done through an agent. A man is often held liable for injury done by his agents in which he has had no part personally.

There are some things which by their nature exclude agency. We do not get married by proxy. Works of art cannot be left to an agent to execute; a barrister or a doctor cannot appoint unqualified persons to take their places, and in important cases cannot act through an agent at all; and other examples will readily occur to the reader where the relationship to be entered into or the work to be done is obviously personal to a particular individual.

Powers of Attorney.—Agents receive their authority to act (*a*) under powers of attorney, or (*b*) in some less formal way, such as by written or verbal instructions, or the authority may even arise from the necessities of the case.

A power of attorney is an authority to an agent

[1] *Bevan* v. *Webb*, 1901, 2 Ch., 59.

conferred upon him by an instrument under seal. Where the principal can only act by an instrument under seal (commonly called a deed), the agent who is to act for him must be authorized in a similar way. For instance, conveyances of land and many share transfers can only be carried out by deeds, and before an agent can execute these for his principal he must obtain a power of attorney from the principal. Powers of attorney vary very much in scope, from an authority to do a single act, such as the execution of a particular deed or the transfer of a particular sum of Consols, to an authority to do every imaginable act during the absence of the principal for a considerable period. A full power of attorney provides for the administration of property as well as for its purchase or sale, and the making of contracts.

Other Forms of Authority.—In cases where a power of attorney is not necessary no particular form of appointment of the agent need be used. It will be found that in such cases agency is created in three ways: (1) The authority may be given by the principal; (2) the authority may be assumed by the agent and afterwards ratified by the principal; and (3) the authority may be created by the necessities of the case.

Where the authority is conferred by the principal, it may be given in express terms, written or spoken, or it may be implied from conduct. Where the authority is express and the facts can be ascertained there can be no difficulty.

Agency by Holding Out.—Something more needs to be said as to authority implied from conduct. The rule as to this has been thus expressed: "Where A has so acted as from his conduct to lead X to believe that he has appointed M to be his agent, and A knows that X

is about to act on that belief, then, unless A interposes, he will in general be estopped (or precluded) from disputing the agency, though, in fact, no agency existed." Such an agent is known as an agent by "holding out," because the principal has by his conduct held him out as agent. Thus, where a dealer in hemp employed a broker to buy hemp for him, and allowed the broker to enter the hemp in the wharfinger's books in his own name, and the broker made use of this to sell the hemp to a purchaser who became bankrupt, a question arose as to the ownership of the hemp, as between the original purchaser and the bankrupt. It was held that the original purchaser was precluded from denying the broker's authority to sell, as hemp left in the broker's name in the wharfinger's books could only have been so left in order to facilitate its sale by the broker. "If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."[1] In another case[2] a dealer in iron sent a waterman to buy iron on credit, and paid for it afterwards. He sent the same waterman a second time with money, who received the goods, but did not pay for them, and put the money in his own pocket. It was held that the purchaser must pay for them again, as the previous dealing justified the vendor in assuming that the agent had authority to buy on credit.

Authority assumed by the Agent.—There is another way in which agency may be established, and that is by the agent taking upon himself to act as agent without the principal's knowledge, and then getting the principal to ratify what has been done. The important point to

[1] *Pickering* v. *Bush*, 15 East, 43.
[2] *Hazard* v. *Treadwell*, 1 Str., 506.

notice is that in law agency so established does not date from the principal's ratification, but from the time when the agent first acted. Thus, suppose A is told by his coal-agent that he has an especially good load of coal in his wharf, and A orders 5 tons for himself and 5 tons for B, his neighbour, who knows nothing of the transaction. When A next sees B he tells him what he has done. B can, of course, repudiate A's action, but if he ratifies it, the coal-dealer and B are in the same position as if B had been present when A gave the order, and had assented to it then. But A must purport to be acting as an agent, as he cannot introduce a third party into a contract made by himself. Thus, if A had ordered 10 tons for himself, and afterwards thought that amount inconveniently large, and asked B to take 5 tons, that would be an arrangement between A and B; but B would have no rights against the coal-dealer, and could not compel him to deliver the 5 tons.

Authority from Necessity.—Lastly, the authority may arise from the necessities of the case. This is, of course, not an ordinary event, and the limits within which agency can so arise are clearly defined. In certain circumstances, as we have already seen, a wife can pledge her husband's credit for necessaries, even against his wishes. If a ship is in port, and necessaries for the voyage are wanting, or repairs to the ship are required, the ship's master can pledge the owner's credit for these purposes. So also a carrier of goods, in case of accident or upon an emergency, becomes agent by necessity for the owner to take care of the goods, and for that purpose can pledge the owner's credit.

General and Special Agents: Extent of Authority.—When the fact of agency has been established, we must

inquire further to what extent the agent has authority to bind his principal. It is not enough to know that he has authority—we must know how much authority. There is a further complication, from the fact that there are cases in which the agent may exceed his actual authority, and yet bind his principal. In the discussion of the authority of agents to bind their principals, it is usual to classify agents into "special agents" and "general agents." A special agent is an agent appointed for a special purpose; a general agent is an agent appointed for general purposes. A special agent has a special authority, and has no power to bind his principal beyond his special authorization. A general agent has the general authority which attaches to his position, and the principal cannot limit this general authority by instructions which are not disclosed to third persons dealing with the agent.

The authority of a general agent may be regarded as a further example of agency by "holding out." If A holds out X as his ostensible agent with certain general powers, well known in commercial circles, and B acts on the faith of such holding out, A cannot afterwards say that X acted beyond his real powers. Thus, if A employs X, a general agent—which expression includes brokers, factors, partners, managers, and all persons employed in a position or business of a generally recognized character, the extent of the authority being apparent from the nature of the employment—A holds X forth as having his full apparent authority, and is bound by all X's acts within that authority, whatever special arrangements A may have privately made with X. But if A employs X as special agent for a special purpose, A does not hold X forth as having any but special powers, and if B wishes to contract with A

through X, B must inquire what are the limits of X's authority.

The example already given of the broker who sold hemp without actual authority is an example in point of a principal held liable for the unauthorized act of his agent.

Two decisions as to warranties given on the sale of a horse bring out clearly the difference between a special agent and a general agent. In the one case[1] a horse-dealer was selling a horse through his brother, who was held out as having the general authority of a horse-dealer's manager, which includes the giving of a warranty with horses sold. Contrary to express instructions, the brother warranted the horse to be sound, and it was held that the purchaser could recover damages from the horse-dealer on the horse turning out unsound. In the other case[2] a farmer was selling a horse through his farm-bailiff. Here the farm-bailiff, acting beyond his authority, gave a warranty that the horse was quiet in harness. It is not part of a farm-bailiff's general duties to sell horses for his master, and he was therefore acting as a special agent. It was held that it was the purchaser's duty to find out what authority the farm-bailiff had, and that he could not recover damages from the farmer on the warranty proving incorrect.

A very important application of these principles has been made in the case of an agent borrowing on securities entrusted to him by his principal. Where the owner of property gives all the indicia of title to another person, with the intention that he should deal with the property, any limit which the owner has imposed on his agent's dealing cannot be enforced against an innocent purchaser

[1] *Howard* v. *Sheward*, L.R., 2 C.P., 148.
[2] *Brady* v. *Todd*, 30 L.J., C.P., 223.

or mortgagee from the agent who has no notice of the limit. In a case[1] where the agent had exceeded his powers of borrowing, Lord Macnaghten said: "The case is reduced to a very simple proposition. A person places his title-deeds under the control of an agent, and instructs the agent verbally to procure for him a certain sum of money by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter entrusted to his agency? It would seem to be in accordance with common sense that the loss should fall on the principal."

The position of certain general agents has become defined by commercial usage, and a short statement as to some of these may be useful.

Factors.—A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale. He usually sells in his own name, without disclosing that of his principal. A factor may sell upon usual terms as to credit, may receive payment of the price, and give a discharge to the buyer.

Originally a factor did not, as a matter of mercantile usage, deal with the goods entrusted to him otherwise than by selling them. Later it became a usual and accustomed course for factors entrusted with goods for sale to make advances to their principals, either in money or by the acceptance of bills, against their consignments, and to keep themselves in funds by repledging

[1] *Brocklesby* v. *Temperance Building Society*, 1895, A.C., 173.

the documents of title with bankers or other money-dealers. As by the common law a pledge was outside the scope of a factor's authority, it was necessary to have recourse to legislation to bring law and mercantile usage into harmony. This has been done by a series of Acts which are now consolidated in the Factors Act, 1889, a short account of which is given in Chapter X.

Brokers.—A broker is an agent employed to buy and sell goods, and differs from a factor in not being entrusted with the possession of the goods for sale, and in not having authority to contract in his own name. He makes a trade of finding purchasers for those who wish to sell, and vendors for those who wish to buy. As long as he describes himself as broker, whether with or without the name of his principal, he incurs no personal liability on his contracts.

Commission Agents.—A commission agent is a person employed to buy goods in a foreign market. He buys as principal in the foreign market, and ships the goods to his own principal, charging a fixed commission on the price paid. He is bound to get the goods as cheap as he reasonably can. He is an agent so far as he is bound to do his best for his principal, and may not make any profit beyond his agreed commission. He is in the position of an independent purchaser so far as his right to the goods is concerned.

Del-Credere Agents.—A del-credere agent is an agent for the purpose of sale who guarantees to his principal that he will only sell to persons who will pay for what they buy. As a consequence of this arrangement, if the buyer does not pay, the del-credere agent must pay. The terms of an ordinary guarantee must appear in writing,[1] but as a del-credere agent does not guarantee

[1] See Chapter XII.

anything but his own conduct, it is not necessary that his bargain with his principal should be in writing.

Agent's Position.—When an agent contracts as agent on behalf of a principal whom he names to the other party, the agent is merely a connecting-link between the contracting parties, and incurs no personal liability. To this rule there are three exceptions: (1) An agent who makes himself a party to a deed, though he describes himself as an agent, may sue and be sued on the contract. (2) An agent who contracts for a foreign principal is, by commercial usage, in the position of a principal (see, as an illustration, the notes above on the position of a commission agent). (3) An agent who contracts for a non-existent principal (*e.g.*, a company not yet formed) is in the position of a principal.

Warrant of Authority.—This last case is really a fragment of a larger rule that an agent who believes that he has an authority to act, which in fact does not exist, is assumed to have warranted that he had authority, and may be sued upon this so-called "warrant of authority." This warrant of authority is not confined to contract, but extends to any case where a person professing to have authority as an agent induces another to act in a matter of business on the faith of his having that authority. Thus,[1] where a stockbroker presented to the Bank of England a power of attorney authorizing the transfer of stock belonging to two persons as joint owners, and purporting to be signed by both of them, whereas the power of attorney had been actually signed by only one of them, the other signature being a forgery, so that the Bank had been compelled to replace the stock, it was held that the Bank could recover their loss from the stockbroker on the ground that he had impliedly war-

[1] *Oliver* v. *Bank of England*, 1902, 1 Ch., 610.

ranted the genuineness of his authority. So in a case where the directors of a railway company, as agents of the company, in good faith made an over issue of debenture stock to the contractor who built the railway, which stock was accordingly valueless, it was held that the directors had by implication represented that they had authority to issue valid debenture stock, and must pay the contractor the value of such stock. The position which arises when an agent does not disclose his principal's name, or conceals the fact that he is an agent, is too elaborate for consideration here.

Revocation of Authority.—The authority of an agent who is appointed to do a single act is revocable by the principal at any time before the agent has acted on his authority. Where, however, the agency is continuous, notice of revocation must be given to such persons as have previously acted on the agency with the knowledge of the principal. The example given above of the waterman sent the first time to buy on credit, and the second time to buy for cash, is in point. There the authority of the agent to buy on credit had been revoked by the principal, but no notice of revocation had been given to the vendor who had previously acted on it.

An agent's authority is revoked instantly by the death of the principal, although there may be no notice of his death. Certain statutory exceptions, where the authority is conferred by power of attorney, are contained in the Conveyancing Acts, 1881 and 1882.

An agent's authority, so far as it is an authority to dispose of property or pledge credit, is revoked by the principal's bankruptcy, as the principal's property on his bankruptcy vests in the Official Receiver, and is not available for the payment of debts subsequently incurred.

CHAPTER V

PARTNERSHIP

Definition and nature of partnership—How partnership is constituted—Partnership or no partnership—Liability of partners to outsiders—Extent and duration of partnership liability—Partners by holding out—New partners and retired partners—Commercial drawbacks of partnership.

Definition and Nature of Partnership.—Partnership is now governed by the provisions of the Partnership Act, 1890. This Act practically codifies the English law of partnership, though, as was to be expected from what has already been said on the possibility of codifying English law, it expressly provides that the rules of equity and common law applicable to partnership shall continue in force, except so far as they are inconsistent with the express provisions of the Act.

Partnership is defined by the Act as "the relation which subsists between persons carrying on a business in common with a view of profit." There are four words in that definition which, if studied carefully, will tell us a good deal about partnership—viz.: (1) Carrying on; (2) business; (3) in common; and (4) profit.

1. *Carrying On.*—When a firm of partners runs into debt and cannot pay its way it becomes a most important matter to know who is a partner and who is not.

The business creditors are not limited to the money put into the business by the partners, but can claim to be paid out of the private moneys and property of the partners. Suppose a rich man puts £1,000 into his son's business to give him a start, and the business fails, the son's business creditors can make the father pay the business debts if the father is a partner; but the father may claim that he is not a partner, but himself a creditor. So a manager with a share of profits may claim to be a servant of the firm and not a partner. Up to about forty-five years ago it was thought to be the law that the receipt of a share of profits was enough to make a man a partner, and that a man who took a share of profits must also be prepared to pay the debts. However, in 1860 the House of Lords decided that persons who share the profits of a business do not incur the liability of partners unless the business is carried on by themselves personally or by their agents. It is often difficult to decide whether the persons who are openly carrying on the business are the agents of others in the background who share the profits. We shall return to this point later on.

2. *Business.*—The term "business" is used in the widest sense, and covers all sorts of enterprises. It includes every trade, occupation, or profession. It is not confined to lengthy operations. Persons may be partners for a single voyage of a ship, or for one performance of a play.

3. *In Common.*—The practical force of this phrase is that the business debts are the common debts of the partners, and as against outsiders each partner is liable for the whole.[1] A partner cannot say to a creditor: "I am only entitled to a fourth share in this business. Here

[1] For the provisions of the Limited Partnership Act, 1907, see the Appendix.

is a quarter of your debt; now go and see what you can get out of the other partners." The creditor replies: "No; the business is your business in common with your partners, and your liability as against me is not limited to your share in the business."

As regards outsiders, the question is not what A and B, two partners, are going to do with any profits they may make, or how they are going to bear losses and pay debts as between themselves, but whether A and his effects are liable to pay for goods which B orders, and *vice versa*. In a particular transaction where A and B are partners, A may be the active agent, but if the business is the common business of A and B, then the creditor may look to B as much as to A.

4. *Profit.*—The essence of a partnership is the attempt to make a profit for the partners. Therefore, a piece of philanthropy, though it may involve a good deal of business, cannot be a partnership. The running of a working men's club by a committee on terms which exclude the making of a profit does not make the committee partners. And this principle applies to each individual, as well as to the whole body carrying on the undertaking. Thus, if A carries on a business with B and C on terms which shut out A from any share of profits, A is not a partner, for his carrying on of the business cannot be with a view of profit.

We must note that an incorporated company is not a partnership, though the definition given above is wide enough to include such companies. Such bodies are so essentially different from partnerships that the Act of 1890 expressly excludes them from that definition, whether incorporation has been brought about by registration under the Companies Act, 1862, as is the case with all limited liability companies; or by the issue

of a charter by the Crown, as in the case of the British South Africa Company and similar companies; or by the passing of a private Act of Parliament, as in the case with railway and similar companies. The distinction between a partnership and an incorporated company is most important. As has been said already, a partnership is not a legal entity, while a corporation has an individuality of its own, apart from the persons who are its shareholders.

In law a "firm" is only a convenient phrase for describing the two or more persons who constitute the partnership, and the firm has no legal existence apart from those persons. The language in use in mercantile circles does not tally with this, and may easily mislead. It is undoubtedly convenient to speak of the firm's property, the debts of the firm, and to say of a partner who has overdrawn what is due to him that he is a debtor to the firm; but these are not legal phrases, and are only countenanced by the Act of 1890 to a limited extent. The Act enacts that persons who have entered into a partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name. The legal position has been thus expressed: "The firm cannot possess property, therefore it cannot be a debtor or a creditor. The rights which a partner enjoys, and the duties which he owes, are enjoyed against and owed to the other partners, and not to the firm; and if an action between the partners be necessary to enforce such rights and duties, the individual partners, and not the firm, are the parties to the action."

How a Partnership is Constituted.—We must always remember in considering partnership matters from a legal standpoint that there are two aspects of a partner-

ship, one from within and one from outside. Inside the partnership, the partners may agree many things between themselves, which may, however, be entirely without effect on outsiders. For instance, A, B, and C may agree to carry on a business in common with a view of profit, but under very special conditions as to C, and may wind up their agreement by saying that C is not to be regarded as a partner. That may bind A, B, and C, but it will not bind X, a creditor of the firm, if in fact C has been acting as a partner. Sometimes much the same thing happens without any elaborate arrangement. If A and B hold C out to be a partner, they cannot afterwards turn round and deny to a creditor, who has acted on these representations, the fact of C being a partner, though C himself might not be able to claim to be a partner. Nor if C has allowed himself to be represented as a partner can he escape a partner's liabilities. We must therefore distinguish between partners and outsiders. As regards the partners themselves, a partnership is created by agreement between the partners, and in no other way. As regards outsiders, the partnership relation may also be created by the conduct of the partners, and in spite of any contrary agreement between themselves.

The agreement between the parties may be of the most informal character, or, on the other hand, it may be an elaborate written document called "Partnership Articles," and be drafted by conveyancing counsel. The most essential parts of any such agreement will be what business is to be carried on, how the capital is to be provided, and how profits and losses are to be shared or borne.

Partnership or no Partnership.—It is often a very difficult matter to determine, in the absence of a

definite partnership agreement, whether a partnership does or does not exist. Commercial men do not stop to provide for all possible contingencies; if they have a working arrangement they are generally satisfied, and legal questions are not considered until something goes wrong. The second section of the Act of 1890 contains some elaborate provisions for determining the existence of a partnership. It will clear our minds to look at some of these.

(*a*) The Act says that joint property does not of itself create a partnership as to anything so owned, whether the owners do or do not share any profits made by the use thereof. For example, A and B own a boat, which they use for rowing on the river. B thinks he would like to have a sail fitted, and, without saying anything to A, buys one on credit. B becomes bankrupt, and the man who provided the sail tries to make A pay for it. A's defence will be that he never ordered the sail, and that B was not his agent. The sail-maker will try to prove that A and B were partners, and therefore B was A's agent; but on the facts as stated he will not succeed in this. Even if he can prove that in the previous summer A and B lent the boat to a friend for a fortnight, and charged him £1, which they shared equally, he will not succeed; for A and B are not carrying on a business with the boat, but are merely co-owners sharing an occasional profit made by the use of the boat. If, on the other hand, A and B agreed to use the boat systematically to make a profit, and so made a business of boat-letting, then A and B would be partners, and B's act in ordering the sail, even without A's knowledge, would be an act of business for which A would be liable; and on B going bankrupt, A could be made to pay the bill.

A good commercial example is the ownership of a patent by two people. The owners may draw royalties for the use of the patent without being partners. So long as they remain merely co-owners, each may sell or mortgage his share, or deal with his share in any way he pleases, which he could not do with a share of partnership property.

(*b*) We have already seen that the test of partnership or no partnership is the carrying on of a common business, and not the receipt of a share of profits. The Act of 1890 thus expresses the law: "The receipt by a person of a share of profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business."

In other words, if a person receives a share of profits, it is for him to prove that he is not a partner; but it is quite open to him to prove this, and the receipt of a share of profits is in fact compatible with the relation of debtor and creditor, and also with the relation of master and servant. The Act specifically mentions the payment of a debt out of profits and the remuneration of a servant by a share of profits as incidents which do not by themselves make the recipient a partner. But there are two special cases mentioned in the Act in which, though the relation may be held to be that of debtor and creditor, yet the creditor obviously stands on such a different footing to ordinary creditors that if the debtor cannot pay all the creditors in full, then the ordinary creditors have a claim to preferential treatment, and are entitled to be paid in full before these special creditors receive anything. These postponed creditors are (1) persons who have advanced money

by way of loan to a person engaged in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business; (2) persons in receipt, by way of annuity or otherwise, of a portion of the profits of a business in consideration of the sale by the recipient of the goodwill of a business.

In the first case, such an arrangement can so easily be made a colourable device for evading partnership obligations that the Act declares that the contract must be in writing and signed by all the parties thereto. In other words, a verbal arrangement must not be concocted at the last moment by a partner who wishes to pass as creditor instead of partner. It should be carefully noted that the putting of the contract into writing will not prevent what is in effect a partnership relation from being so treated by the Courts. Thus,[1] A, B, and C entered into an agreement in writing expressly referring to the above enactment, and saying that A and B were to be partners, and C was to lend them £10,000 for the term of the partnership, but was not to be a partner. That sum was the whole of the partnership capital. C was to be entitled to inspect the books and receive a copy of the annual account, and to share profits in a fixed proportion, and had other rights. It was held that C was a partner, in spite of the contrary language of this agreement.

The second case is aimed at the sale of a business to a man of straw, who ostensibly carries it on, and is responsible for the debts, while the former owner draws the bulk of such profit as may be made.

Liability of Partners to Outsiders.—Even a preliminary

[1] Ex parte *Delhasse*, 7 Ch., Div. 511.

survey of partnership will lack completeness if something is not said about the liability of partners for the acts of each other. As a rule each active partner transacts business for the firm independently, and does not get the consent of his co-partners before acting. Sometimes one of the partners is a dormant or sleeping partner, and by express arrangement does not interfere in the management of the business. But, whatever the nature of the partnership, it may be taken for granted that an active partner will be constantly acting by himself in the firm's business, and this question may therefore often be raised: "To what extent do the unauthorized acts and engagements of one partner bind the other partners?" The Partnership Act says that "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership." These last words, "for the purpose of the business of the partnership," afford us the criterion we need. Thus, if a partner purchases usual stock-in-trade from a traveller, all the partners are liable for the debt so incurred.

Now, suppose that a partner in a boot factory were to order on credit 500 cases of oranges on his own initiative, and to send the order on the firm's notepaper and in the firm's name. Here the order would be so clearly not for the purpose of the business of the partnership that he alone would be liable. The Act goes on to state the same rule in other words by saying that "the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners," subject to exception where the outsider does not in fact give credit to the firm, but only to the individual partner. The words

"in the usual way" are put in because as soon as a usual act is done in an unusual way the outsider may well be put on inquiry into the unusual circumstances under which he is being called upon to give credit. It is not unreasonable to expect him to ask whether the partner has authority to act as he is doing. If he chooses to pass what is unusual, then he must not seek to charge persons other than him with whom he is actually dealing.

The Act of 1890 states our criterion not only from the positive side of acts which do bind the partners, but also from the negative side of acts which do not bind them. It says that "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners."

The following rules are drawn from judicial decisions, and may help to give a conception of what operations are or are not done in the ordinary course of business. Any member of a trading partnership may buy and sell goods which are usually bought and sold by the firm, and he may draw, accept, or endorse bills in the name of the firm. If the partners are engaged in some trade or profession in which bills are not in general use—*e.g.*, if they are auctioneers, doctors, or solicitors—one partner has no authority to draw, accept, or endorse bills in the name of the firm without the consent of the other partners. Any partner may draw cheques in the name of the firm, for this is an everyday matter which one partner can do as well as another; but he cannot open a banking account in his own name on the firm's behalf without express authority. One partner may borrow money where it is required in the ordinary way

for immediate use in the business of the firm, but he cannot do so for the purpose of increasing the capital of the firm, which is a matter for the agreement of all the partners, or where the business carried on by the firm is not one that is likely to require an immediate supply of ready-money.

The same principles apply to wrongs done by a partner. The Partnership Act enacts that "where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act." In one case[1] a customer deposited two Exchequer bills with his bankers. The acting partners of the bank sold the bills without the customer's authority. It was held that the amount of money received on their sale became a partnership debt, whether the individual partners were or were not aware of the sale.

Difficult questions sometimes arise as to when a partner is or is not acting in the ordinary course of the business of the firm. In the case of both banking firms and solicitors it is not unusual for customers and clients to hand over large sums of money for investment, and in some cases the partner seeing to that part of the business has disobeyed his instructions, or has appropriated such money for his own purposes. In both professions it has been laid down that it is acting within the ordinary course of business to accept money to be invested on specific investments mentioned by the client, but it is not so acting when the money is handed over with merely a general direction to find an investment for it.

[1] *Devaynes* v. *Noble*, 1 Mer., 572.

In the first case the innocent partners would be liable for the partner's misappropriation, and in the second case they would not be liable.

Extent and Duration of Partnership Liability.—A person who has dealings with a firm, so long as matters proceed smoothly and debts are paid or goods delivered, possibly does not consider very closely who the partners are; but as soon as he has a claim against the firm which is not met, he has to look at the individuals who may be liable to meet his claim. He will then be advised that possibly four classes of persons may be liable, which may be roughly classified as follows: (1) Actual partners; (2) partners by holding out; (3) new partners; and (4) retired partners.

Actual Partners.—As we have already explained that an acting partner, so long as he is acting for the purposes of the partnership, is an agent for his actual partners, it is only necessary to reiterate that dormant or sleeping partners are just as much principals as the acting partners.

Partners by Holding out.—We have already had examples of this principle in agency. The Act of 1890 in sec. 14 says that "every one who by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm." Thus, if a father, to get credit for his son who has just started a business, conducts himself as a partner with the son, and credit has been given to the son in reliance on the father's conduct, the father will in that case have a partner's liability. So, if the father says to his son, "If X makes any difficulty about supplying the goods on credit, tell him I am in the

business as well as you," the father has a partner's liabilities as against X, and this is so even if the son goes beyond his instructions and tells Y the same story.

New Partners and Retired Partners.—As to both these classes of partners, the guiding principle is that "the partners cannot by any variation of the membership of the partnership affect the rights of a creditor, as determined at the time the debt arose, without his consent." As regards new partners, the Act puts it this way (sec. 17 [1]): "A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner." For instance, X is a creditor of a firm of which A, B, and C are the members. D is admitted into the partnership. X does not become a creditor of D. Further, if when D is admitted, A, B, C, and D agree that the four shall be liable for the debts of A, B, and C, even then, as X is no party to this arrangement, he cannot sue D unless D has made some binding agreement with X to that effect. Such an agreement may be inferred from conduct, as we shall soon explain.

As regards retired partners, the Act (sec. 17 [2]) says that "a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement." For instance, X is a creditor of a firm of which A, B, and C are the members. A retires, but X still remains a creditor of A. Possibly A is the senior partner, whose experience and judgment have kept the firm in a flourishing condition. If two years after A has retired the firm becomes bankrupt, A will still be liable for such debts as were in existence at his retirement and are still undischarged.

But A may be discharged from his liability by the

consent of the creditors, and this consent need not be embodied in a formal agreement, but may be left to be inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. When a debt originally payable by one set of partners becomes payable by another set of partners, the technical phrase for what has happened is "a novation of the debt." The following is an example:[1] A and B are partners. F is a creditor of the firm. A and B take C into partnership, but C brings in no capital. The assets and liabilities of the old firm are, by consent of all the partners, but without any express provision in the new deed of partnership, transferred to and assumed by the new firm. The accounts are continued in the old books as if no change had taken place, and existing liabilities, including a portion of F's debt, are paid indiscriminately out of the blended assets of the old and new firm. F continues his dealings with the new firm on the same footing as with the old, knowing of the change, and treating the partners in the new firm as his debtors. C, as well as A and B, has become liable to F.

Questions of novation have arisen with some frequency in the case of banking partnerships. In one case,[2] after the death of the senior partner, a customer who had £1,400 on deposit withdrew £550, and received a fresh deposit note for £850. It was held that the giving of a fresh deposit note was only a convenient and very usual way of writing off a part of the debt due from the bank, but was not sufficient evidence of novation to discharge the estate of the original debtor. But when one of the customers closed his current account, and had the balance to his credit carried to a new deposit

[1] From Pollock on Partnership.

[2] In re *Head*, 1893, 3 Ch., 426.

account, it was held that there had been a novation of the original debt.

Commercial Drawbacks of Partnership.—We will conclude with a few obvious drawbacks of partnership deduced from the principles we have been examining. There is no such thing as "limited liability" in English partnership.[1] Except under very complicated conditions, a partner is liable to the full amount due to the firm's creditors. This has undoubtedly checked enterprise. In cases where it is very convenient to raise the capital required for a given undertaking from a large number of persons, it is a serious matter for each of them to feel that he is liable for the whole of the partnership debts; and though in practice no one man would be likely to be called upon to pay all this, yet the risk of having to pay a very large sum might be considerable. A man who was willing to find £1,000 to put into a joint-stock partnership with a capital of £250,000 might be willing to risk his £1,000, but it might be a most serious matter for him to be liable for £100,000, or even £10,000, of debts. This was one of the reasons which led to the demand for the recognition of joint-stock companies with the option of limited liability, and now the position is that a partnership is illegal if it consists of more than twenty persons, and if it is a banking partnership of more than ten persons.

Then, again, we have seen that a retiring partner does not step out of his liabilities by retiring, nor does a new partner assume old liabilities when he enters. Now, in the commercial world this is very often what people want. A man retires from business, and he wants to be done with its debts and liabilities; a man

[1] But see now the provisions of the Limited Partnership Act, 1907, as given in the Appendix.

goes into business, and is prepared to take his place in the business as it is, liabilities and all. But partnership does not allow this to be done without arrangements with creditors which are generally too complicated to be practicable. We shall see that the system of limited liability companies does very largely meet these commercial requirements. But it is not merely the difficulties with creditors that stand in the way of partners coming and going. If A, B, and C are in partnership, A cannot retire or D be admitted without the consent of B and C. Shares in a partnership are not, in general, transferable shares at the will of the owner. Now, transferable shares have distinct commercial advantages, and the shares of a limited liability company are, in general, made thus transferable.

Lastly, a partner must have absolute confidence in his copartners' integrity and business ability. So long as they are acting within the scope of the business, he is bound by their acts, and he may be ruined by their dishonesty or stupidity. Thus, the selection of a partner is a matter which requires great care.

CHAPTER VI

CORPORATIONS AND INCORPORATED TRADING COMPANIES

Definition—Charter—Perpetual succession—Use of common seal—Incorporated trading companies—The Bubble Act—Large copartnerships—Incorporation by registration—Companies Act, 1862—*Commercial functions—Private companies—Memorandum of association, etc.—Name—Objects clause—Doctrine of ultra vires—Implied powers—Limitation of liability—Capital and shares—Reserve capital—Power to alter memorandum—Articles of association—Persons dealing with companies—Shareholders in companies—Acquisition by allotment and by transfer—Share certificates—Liability of past shareholders—Debentures by way of floating security.*

Definition.—So far we have been dealing with natural persons of different degrees of capacity, and sometimes acting by themselves, and at other times through agents or as agents. Now we must turn to a legal personality known to the law, but having no natural existence—namely, a corporation. It is only in quite recent times and by statute that trading companies have been granted in any large numbers the privileges of incorporation, and in order that we may understand exactly on what terms they can avail themselves of that privilege, we must know something about common-law corporations. These were

known to English law for centuries before it occurred to anyone that traders would benefit by incorporation. The definition of a corporation taken from a law book runs as follows: "A corporation is an artificial person created by law, having perpetual succession, a distinctive name, and a common seal." The corporation of a town or city is a typical example. Such a corporation can sue, as you will find out if you do not pay your rates, and can be sued, as you would be advised if you were negligently run down by a corporation tramcar, but you cannot shake the corporation by the hand, or knock it down in a fit of temper.

Charter.—The definition given above may be broken up into four assertions. It says first that a corporation is a legal person, though an artificial person. The earliest mode of incorporation was the grant of a charter by the Crown under its inherent prerogatives. This idea of a charter is fundamental. A charter may be defined simply as a writing which brings this artificial person into existence, and defines its objects and powers. All these artificial persons, whether incorporated for public purposes, as a city corporation is, or incorporated for trading purposes under a general Act of Parliament, have some writing to testify to their creation, and in the same or some other document have more writing which defines the object of their existence and their powers. If the corporation is a chartered corporation, the charter will contain the record of creation, objects, and powers. If the Corporation is a trading company incorporated under the Companies Act, 1862, it will have a certificate of incorporation, which is the record of its creation, and a memorandum of association, which defines its objects and powers.

A corporation is therefore an artifice—or dodge—for

the purpose of effecting certain ends more easily than through a mere combination of natural persons, and its powers are strictly limited by the necessity for using that particular artifice. "A corporation is always constituted for some particular purpose, for which only it exists, and the capacity of the corporation may accordingly be expressly defined and limited by the terms of its constitution; and if not so defined its capacity may be impliedly limited by the purpose and object of its existence." We shall return to this point later on.

Perpetual Succession.—Then we are told by our definition that a corporation has perpetual succession. We are all familiar with the saying: "The King is dead; long live the King!" That is only a popular way of saying that the Crown has perpetual succession, or, to put it in another way, that the life of the Crown is independent of the life of the individual King. The same principle applies to the individual membership of a corporation. Members may come, members may go, but the corporation goes on, and the life of a corporation is independent of the lives of its constituent members. In the case of a city corporation, such events as the making up of a new burgess roll, the election of a new mayor, or the death of various burgesses, do not alter in any way the identity of the corporation.

We may deduce an important corollary from this. Not only is the existence of a corporation independent of the identity of its actual natural members, but the legal relationships into which the corporation enters are not the legal relationships of its individual members. For instance, a city corporation is engaged in a lawsuit. Then there comes a change in the mayoralty, but no fresh party need be added in the action, nor does the outgoing mayor, as such, bear any further liability. If

burgess A qualifies, and burgess B loses his qualification, and so on, the new group will step into the rights and liabilities of the old group. This is all very different to what we found to be the case with partnerships.

Distinctive Name.—Then, a corporation has a distinctive name. A charter or a private Act of Parliament may run thus: Smith, Jones, Robinson, etc., are hereby incorporated under the name and title of the Governor and Company of the Bank of Timbuctoo. A memorandum of association will run thus: "The name of the Company is the Bank of Timbuctoo, Ltd." But in each case there must be a name, and a distinctive name. In the case of companies registered under the Companies Act, 1862, the registrar is forbidden to register a company with a name either the same as that of an existing company or so similar to it as to create confusion.

Use of Common Seal.—Lastly, a corporation has a common seal. This is another artifice to enable an artificial person to do something equivalent to the signature of a natural person. When corporations first appeared in English law writing was a very rare accomplishment, and individuals had their distinctive seals, and sealing was the ordinary way of assenting to the contents of a deed. To this very day it is an undecided question whether a deed need be signed as well as sealed, though I do not advise any of my readers to raise the question. In those early days, on looking at a deed, one said: "A has executed that, for there is his seal"; and it was a very easy fiction to say: "The corporation has executed that, for there is its seal." The same fiction does not apply so easily to signatures, for the impress of a seal is always the same, while the written signature of an agent varies with every change of agent. Hence, when writing became more common,

and individuals signed documents of minor importance without using a seal, the practice still survived of corporations sealing their acts, and it is still the rule to-day that a corporation must have a common seal, and must use its seal (with certain exceptions) to give expression to its intentions. "It is a general rule of the common law that a corporation can express an intention or make a contract only by deed or writing under the common seal." An exception has long been made in favour of contracts made by trading corporations in the course of their business, and in all corporations the use of the common seal may be dispensed with in matters of slight or temporary importance, or of frequent or ordinary occurrence. Thus, a city corporation could appoint a messenger without seal, but could not give its town clerk an increased salary without the use of its seal.

The use of the corporate seal without the proper use of the name, and the use of the name without proper authority to use the seal, are both ineffective to bind the corporation. But where an instrument is produced bearing the seal of a corporation, it is *primâ facie* to be taken that the seal was properly affixed, and it lies upon the party disputing the execution to show that the necessary authority was not given.

Incorporated Trading Companies.—The adaptation of incorporation to trading companies is our next point, and it is not altogether a simple one. Let us examine first the nature of an unincorporated joint-stock company. "A joint-stock company is a society consisting of a number of individuals having transferable shares in a common fund." In essence it only differs from a partnership in having a large instead of a small number of partners, and in the transferability of the shares. It does not differ as regards the unlimited liability of its

members for the company's debts. We need hardly say that a joint-stock company was unknown to the common law, which knew no half-way house between a partnership and a corporation. Charters of incorporation were occasionally granted by the Crown to groups of individuals who had exceptional influence, such as the promoters of the English East India Company and the Bank of England. Where anything in the nature of a trade monopoly was conferred, the authority of an Act of Parliament was used so confirm the charter. The only fund to which the creditors of such chartered companies could look for payment was its assets. The corporation owned certain property, and, as in the case of a natural person, that property was liable for its debts; but nothing else was liable, and the members of the corporation staked nothing but their share of its assets. On the grant of a common-law charter to a body of traders who had subscribed a certain amount of capital, the only risk run by the traders was the loss of the subscribed capital. But this was not in accordance with English ideas as to liability for trade debts, and so chartered trading corporations remained quite exceptional.

The Bubble Act.—At the beginning of the eighteenth century (1720), during the palmy days of the South Sea Company, there was quite an epidemic of company promotion, and joint-stock companies of the wildest character were launched. In the year 1725 an Act, called the Bubble Act, was passed, which recited the growth of dangerous and mischievous undertakings and projects wherein the undertakers and subscribers have presumed to act as if they were corporate bodies, and have pretended to make their shares transferable, and which enacted that such actions, unless authorized by

Act of Parliament or charter, should be illegal and void, and all such undertakings should be deemed to be public nuisances.

As the reader knows the South Sea Company came to grief, and joint-stock companies went out of favour. Fifty years later Adam Smith wrote in the "Wealth of Nations": "The only trades which it seems possible for a joint-stock company to carry on successfully, without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity of method as admits of little or no variation. Of this kind is, first, the banking trade; secondly, the trade of insurance from fire, and from sea risk and capture in time of war; thirdly, the trade of making and maintaining a navigable cut or canal; and, fourthly, the similar trade of bringing water for the supply of a great city." During the next fifty years, a period often spoken of as that of the Industrial Revolution, rapid changes took place in English commerce, and trade on a large scale became a more important factor in the life of the nation.

Large Copartnerships.—In the year 1825 the Bubble Act was repealed, and by the repealing Act the Crown was empowered to grant charters of incorporation, and at the same time to declare that the persons incorporated should be individually liable for the debts of the body corporate, to such an extent and subject to such regulations as should be declared in the charter. This Act has not been used to any great extent in England, but a good many colonial banks were formed as chartered banks under its provisions.

In the next year, 1826, an Act of Parliament was passed to facilitate the formation of joint-stock companies for banking purposes without incorporation.

Such a company resembled a partnership more closely than a corporation, but had some of the features of both. It was a copartnership created by deed or articles of copartnership for a particular purpose, with certain statutable privileges and liabilities. This deed was necessarily of a somewhat elaborate character, and came to be known as a deed of settlement. The company could sue and be sued only in the name of one of its public officers, and individual members could not sue and be sued in respect of transactions with the company till a judgment or decree had been first obtained against the company. New members, on entering the company, became liable for current liabilities. Retiring members were liable for a period of three years after their retirement. So long as a member was liable his liability was unlimited. A general Act facilitating the formation of such copartnerships was passed in 1834. But no joint-stock company was as yet capable of being incorporated without either a special application to the Crown for a charter or a private Act of Parliament. In the former case the Attorney-General decided as to the special merits of the application; in the latter, committees of the two Houses of Parliament. Both procedures involved expense, delay, and uncertainty.

Incorporation by Registration.—In the year 1844 we get the first Act, which granted incorporation by registration, and on compliance with certain formalities. It was not till 1855 that the principle of a limit to liability was conceded. We need not trouble ourselves about these two Acts, as in 1862 the Companies Act was passed, which is still the basis of our present company law.

What marks does the Act of 1862 bear of its history? First, the liability of shareholders is unlimited, unless an

express declaration is inserted in the memorandum of association that "the liability of the members is limited," and the word "limited" forms the last word in the company's name. Secondly, even where the liability is limited, there is liability for uncalled capital. Lastly, past shareholders are liable for a year from the time at which they ceased to be shareholders. In other respects a company under the Companies Act, 1862, closely resembles a common-law corporation.

Companies Act, 1862.—The Act of 1862 forbade in future the formation of partnerships for banking where there were to be more than ten partners, and for other purposes where there were to be more than twenty partners. Incorporation is obtained by registration, which is quite a simple matter. Seven or more persons sign the memorandum of association, which is in effect the charter, and on handing this to the registrar of joint-stock companies and paying certain stamp duties and fees, they become entitled to a certificate from the registrar that the company is incorporated. On the issue of the certificate the subscribers to the memorandum, together with the future members of the company, become a body corporate by the name mentioned in the memorandum, having perpetual succession and a common seal, and have power to hold land.

Commercial Functions.—It may not be out of place to say something as to the commercial functions of joint-stock companies, and the following quotation[1] is worth noting: "Joint-stock companies have rendered an enormous number of undertakings possible which, from the amount of capital required, could not have been carried out by a capitalist or group of capitalists. Further, many businesses can be carried on more economically on

[1] "A Century of Law Reform," p. 400.

a large scale, the ratio of expenses growing less in proportion to the size of the capital employed. Thirdly, capitalists on a large scale can afford to risk more in the field of inventing and perfecting processes. On the other hand, it is tolerably certain that the management of joint-stock companies (excluding private companies) is not equal to that of individuals or partnerships, and many things, therefore, have doubtless been badly done by joint-stock companies which, if joint-stock companies had not existed, would have been well done by a firm or individual. Limited liability in one form or other is, or appears to be, a necessity of modern commerce, and tends to encourage undertakings of evident utility, but involving risk to the undertakers. It provides also a convenient means of investment for persons who are, or are presumed to be, of no business capacity. On the other hand, it tends to promote gambling to an enormous extent. It weakens the genuine business capacity of the nation by diminishing the incentives to care in making investments. It tends to encourage dishonesty, for it is one great cause of that neglect to scrutinize and verify prospectuses which render possible the success of fraudulent promoters."

Private Companies.—It will be noticed that in the above quotation an exception was made in favour of "private" companies. This is a convenient place for explaining what is meant by the term "private company." It is often a convenience to turn a partnership into a company, and when the whole of the shares are taken by the partners or their families, and the partners become directors, and the public is not asked to subscribe either debentures or shares, then such a company is known commercially as a private company. From what has already been said about partnership, it will be realized

that the death of the chief partner may be a very serious event. On the one hand, it may be very inconvenient for the surviving partners to pay out the share of the deceased partner in cash; on the other hand, the executors of the deceased partner may be unable, or possibly unwilling, to run the risk of leaving his capital in the partnership. If, however, the partnership has been turned into a company with limited liability and fully paid shares, on the death of one of the old partners there will pass to his executors fully paid shares. If necessary, these can be divided amongst the beneficiaries without realization, or if for any reason it is necessary for the executors and trustees to retain the shares for any length of time, they can do so without incurring personal liability. For family reasons, therefore, as well as to gain the advantages of limited liability, many business firms have been registered as companies under the Companies Act, 1862. But in law there is no distinction between a private company and a public company. The legal distinction, which did not arise at all until the passing of the Companies Act, 1900, and which is not quite parallel, is between a company which issues a prospectus inviting subscriptions for shares or debentures and a company which issues no prospectus.

Memorandum of Association, etc.—Let us now examine somewhat more in detail the constitution of an ordinary trading company under the Companies Act, 1862, with share capital and limited liability. The whole of its constitution will naturally be in writing. There will be three documents: (1) The certificate of its incorporation; (2) the memorandum of association; (3) articles of association, which will be either specially prepared for the company, or will consist of common form clauses, known

as Table A. The certificate will contain a statement as to the date of incorporation, and from that date the incorporation takes effect. The certificate is conclusive evidence that everything is in order as regards registration. The date is of considerable practical importance, as the company cannot be bound by the acts of its agents until it is actually in existence.

The memorandum of association is, as we have said, virtually the charter of the company. It is the written document which contains its name and objects, and certain other particulars naturally following from the scheme of the Act of 1862. It must state—

(1) The name of the company.

(2) The part of the United Kingdom in which the registered office is to be situated.

(3) The objects for which the company is established.

(4) That the liability of the members is limited; and

(5) The amount of capital with which the company proposes to be registered, divided into shares of a certain amount.

The Name of the Company.—The promoters of a company may give it any name they choose, subject to the enactment already mentioned, forbidding the registrar to register a second company with a name identical with another company, or likely to lead to confusion, and subject to the general rules of law already explained as to the use of a name to capture other persons' business. A company may, in addition to its name as given in the memorandum of association, use a trade name, and has a right to be protected in the user of such name. Under sec. 41 of the Act of 1862, every limited company must paint or affix its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and

must have its name mentioned in legible characters in all notices, advertisements, bills, invoices, etc.

Registered Office.—Every company must have an office to which notices can be sent. One object of having a clear and definite statement as to the place of the registered office is to ascertain without question whether the company is an English, Scotch, or Irish person. We have already seen that this may be a matter of importance.

Object Clause and Doctrine of Ultra Vires.—The object clause of the memorandum is of supreme importance, as indicating the extent of the company's powers.

The House of Lords, within a few years after the passing of the Act of 1862, had the whole question before it, and laid down the following general principles:[1] A company created a corporation under the Companies Act, 1862, is not thereby created a corporation with inherent common-law rights. The objects of such a company as stated in its memorandum of association cannot be departed from. A contract made by the directors of such a company upon a matter not included in the memorandum of association is *ultra vires* of the directors and not binding on the company, and cannot be ratified even by the assent of the whole body of shareholders.

Lawyers, with their usual ingenuity, tried to get round this decision in the following manner: In drafting a memorandum, the paramount object of the company was put in the first clause, and then in succeeding clauses a whole host of subsidiary objects were expressed in the most general terms. Thus, a company formed to purchase tea plantations in Ceylon might take powers under which, at first sight, it would seem

[1] *Ashbury Carriage Co.* v. *Riche*, L.R., 7 H.L., 653.

able to work diamond mines in South Africa. The Courts met this ingenious drafting by placing emphasis on the first clause, and allowing general powers to be used only so far as they might be subservient to the main object of the company. This principle has been expressed thus:[1] "In construing any memorandum of association in which there are general words, care must be taken to construe these general words so as not to make them a trap for unwary people. General words construed literally may mean anything, but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are." Thus, in the case of the Coolgardie Consolidated Gold-Mines, the Court held, having regard to the company's name and the first clause of its objects, that its paramount object was to work a particular mine in Coolgardie. One of the general objects of the company was to acquire and work mines in West Australia and elsewhere. The Coolgardie Mine was abandoned, and the directors proposed to work a mine in the colony of Victoria. A shareholder who disagreed with the directors' policy disputed the right of the company to do this, and the Court held that the shareholder was right, and that on the failure of the Coolgardie Mine the real substratum of the company was gone, and it ought to be wound up. The tendency of the latest decisions is to be somewhat more generous in construing what is included amongst the paramount objects of the company.

The question of what is or is not *ultra vires* is one of vital practical importance, for a party to a transaction

[1] In re *German Date Coffee Co.*, 20 Ch.D., 188.

with a company which is *ultra vires* cannot enforce it. And there are risks even where the immediate transaction may be within the powers of a company—*e.g.*, the overdrawing of its banking account, if it is part of a scheme which is *ultra vires*. For example, when a company makes a new departure in its business it is almost certain to be in want of money; and if, after money has been advanced to it for such purpose, a shareholder obtains an injunction to restrain the company from carrying out its plan on the ground that the scheme is *ultra vires*, the money may not be forthcoming for repayment. The first thing that a party to a transaction with a limited company has to do is to make sure that the transaction is not *ultra vires*.

Implied Powers.—On the other hand, a company may have powers, as distinct from objects, which are not expressly set forth in the memorandum of association, if they are really incidental to the objects which are expressed. These are called implied powers. Thus, an ordinary joint-stock company constituted for commercial purposes has an implied power to borrow money, but a building society has been held only to have such a power if it is expressly given. A trading company, without having defined borrowing powers, may raise money by overdrawing their banking account in the ordinary way of banking business, and so may an insurance company and a railway company. A trading company has power to draw and accept bills of exchange and promissory notes in the ordinary form, but a railway company has no implied power to issue bills, as it is not a necessary incident to the undertaking to have such a power.

The following powers will not be implied unless there is some special ground for so doing; and if it is desirable to possess them, as it usually is, power should

be expressly taken in the memorandum. These powers are—

(1) The purchase of other concerns.

(2) The promotion of other companies.

(3) The sale of the whole undertaking of the company.

(4) Application to Parliament for a special Act.

Limitation of Liability.—As has already been pointed out, limitation of liability can be obtained by a declaration embodied in the memorandum of association. The shareholder's liability will then be limited to the amount unpaid on his shares. Thus, if A has subscribed for a £10 share and has paid up £5, he can be made to pay another £5 in the event of the company being wound up and the assets proving insufficient to pay the creditors. If B has subscribed for a £10 share and has paid up £10, he holds a fully paid share, and cannot be made to pay any more, even if the company cannot pay its creditors. If B sells his share to C, even for a nominal amount, say 5s., C stands in the same position, and cannot be made to pay any more.

Capital.—Lastly, the memorandum of association must contain a statement as to the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount.

The specimen form given in the schedule to the Act of 1862 is: "The capital of the company is £200,000, divided into 1,000 shares of £200 each." This £200,000 is technically known as the *nominal* capital of the company, and may exist only in name. When capital has been actually allotted to shareholders, it is known as *issued* capital. The issued capital of a company may naturally be much less than the nominal capital. Again, issued capital may consist of shares which are either

fully paid up or only partly paid up. In the latter case we have a further distinction in the term "paid-up" capital. Thus, of the £200,000 referred to, only £100,000 may have actually been issued; and while £200,000 is the nominal capital of the company, £100,000 is its issued capital. But the £200 shares which have been issued may be only paid up to the extent of £20 each. In that case the paid-up capital will be £10,000.

Shares need not be all of one class, ranking equally for dividend and in the winding-up of the company. Various names have been adopted to show the relative rights of different classes of shareholders. The most usual are preferred, ordinary, deferred, and founders' shares. The preference may consist of a prior right to dividend out of the profits of each year or half-year, or a continuously prior right (cumulative preference shares) to dividend, so that deficiencies in the dividend in past years must be made up before the ordinary shareholders have a right to participate. The preference need not be limited to dividend, and may give a preferential right to the repayment of capital in the case of a winding-up. But preference shares have no preference as regards capital unless that is expressly granted.

Deferred or founders' shares are generally taken by the promoters of the company, partly to guarantee that the promoters do not participate in profits until a minimum amount has been earned, and partly to give the promoters a chance of big gains if the business turns out well. To this end, these shares generally take the whole of the profits after payment of dividends on the preference and ordinary shares to a limited amount, and after making provision for reserves. It is hardly necessary to add that too much attention must not be paid

to names, for ordinary shares, where there are no debentures or preference shares, may be a better security than preference shares where there is a heavy issue of debentures. The memorandum of association need not state whether all the shares are to rank equally or not. If it does state what the rights are of the various classes of shareholders mentioned in it, then those stipulations are thereby made part of the charter of the company, and are unalterable. If there is nothing in the memorandum of association to the contrary, the company may, either by its original articles of association or by special resolution altering the articles, take power to issue shares with differing rights.

Reserve Capital.—Limited liability, as established by the Act of 1862, was not found altogether satisfactory from the point of view of banking and insurance companies. These companies have special classes of creditors —in the one case depositors, in the other policy-holders —to whom the financial stability of the debtor company is of primary importance. A company for either of those purposes floated with fully paid shares would not be likely to prove attractive. On the other hand, an unlimited company, if it failed (as did the Glasgow Bank in 1878), brought ruin on the smaller shareholders. The Companies Act, 1879, met these difficulties by making provision for the creation of reserve capital, which was only to be called up in the event of the company being wound up. Suppose the shares of a bank are £100 shares, of which only £20 per share has been paid up. Under the Act of 1862, if the company was getting into difficulties, it could call up, say, another £20 per share and go on with its business, and so on from time to time until the whole of its capital was paid up. When the final crash came, its assets would possibly

be all mortgaged to secured creditors, and the depositors and general creditors would take nothing. The Act of 1879 enables a limited company in such a position to declare by special resolution that the £80 per share of uncalled capital shall not be capable of being called up, except in the event of, and for the purposes of, the company being wound up, so that in this particular instance a sum four times the amount of the issued capital would be available for the general creditors. Reserve capital under the Act of 1879 is now quite usual with these classes of companies.

Alteration of Memorandum.—Until the passing of the Companies (Memorandum of Association) Act, 1890, it was no more possible for a company to alter the object clause, than for a chartered company to extend the scope of its charter. Fresh powers could only be obtained by reconstruction. By the Act last mentioned it has become possible to alter the object clause of a memorandum of association within certain limits if the sanction of the Court has been first obtained. The sanction of the Court may be given if the alteration is required to enable the company (*a*) to carry on its business more economically or more efficiently; (*b*) to attain its main purpose by new or improved means; (*c*) to enlarge or change the local area of its operations; (*d*) to carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; (*e*) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

Articles of Association.—We need not say much about the articles of association of a company. These provide for the management of the internal affairs of the com-

pany, and the shareholders assembled in general meeting can, on proper notice of proposed alterations being given, resolve to alter the articles, and on confirmation of the resolution the articles stand as so altered. Both the memorandum and articles of association are registered with the Registrar of Joint-Stock Companies, and are open to the inspection of the public during office hours on payment of a nominal fee.

Persons dealing with Companies.—Our next point is this: What inquiries are outsiders bound to make before they can deal safely with a joint-stock company? Here the law draws a distinction between the external acts of a company and what is done privately as a matter of internal regulation. As to the external acts, an outsider can, by ordinary inquiry, tell whether they are in order, and must suffer if they are not in order. Thus, suppose the memorandum of association of a company says that the company shall not borrow money by an overdraft from its bankers (or, what comes to the same thing, suppose that the company exists for purposes for which an overdraft is not necessary, and has no express power to borrow in that way), then the company's bankers can, by inspection of the memorandum, satisfy themselves that the company, in asking for an overdraft, is seeking to do something *ultra vires*. If the bankers are careless enough not to make themselves acquainted with the contents of the memorandum, or after inspection of it like to take the risk, that is their concern, and they cannot, when others object to their being treated as creditors, justly say that they acted in ignorance and were misled. They could have found out the powers of the company. On the other hand, if the company had power to overdraw its banking account with the consent of a general meeting of

shareholders, and the bankers are shown what purports to be the resolution of a general meeting, they cannot reasonably be expected to see that the notices of the general meeting were correct, or that a quorum was present, for matters of that sort involve an intolerable inquiry into the internal affairs of the company. The distinction may be put thus: A person dealing with a company has notice of what has been called the external position of the company—viz., the contents of documents like the memorandum and articles of association, which are open to inspection by the public. But where the regulations laid down by these documents appear to have been complied with, it is not the duty of the person dealing with the company to see that the apparent conformity is a real conformity.

Shareholder in Companies.—So far we have been considering companies from the outside, but there are one or two other points of view which are important, and we will consider shortly how a person becomes and ceases to be a member of a company, and the favoured position of debenture holders who have a floating security over the assets of a company.

A shareholder in a limited company is either an original allottee of the shares or derives his title from some previous holder.

Acquisition by Allotment.—A shareholder becomes an original allottee of shares either by signing the memorandum of association, or by making an application which is followed by allotment, or by accepting an offer of shares made to him by the company. The most usual way is for the intending shareholder to fill up a printed form of application, to which the company accedes by the posting of a letter of allotment. Applications in the case of public companies are usually made

on the faith of a prospectus, and the Companies Act, 1900, was specially passed to deal with prospectuses; but the treatment of the various rules of law, statutory and otherwise, which deal with prospectuses is beyond the scope of this work.

Acquisition by Transfer.—Where the intending shareholder is taking shares from the company itself, all we have to look for is some binding agreement between the company and the shareholder. Where the intending shareholder is taking shares from an existing shareholder, there must be an actual transfer of the shares as well as an agreement to transfer them. A transferee does not become the legal owner of shares until he has completed his title by becoming the registered owner of them, or until he has at least "a present absolute and unconditional right to registration."[1] What usually happens is that the sale and purchase is effected by Stock Exchange brokers. The seller sends to his broker the certificate of the shares sold, and this is handed to the secretary of the company in which the shares are held. The seller's broker prepares a transfer which is generally under seal, though it need not be under seal unless the articles of association so direct, and, after getting the secretary of the company to note or certify on the transfer that the shares dealt with by the transfer have been deposited at the company's office, sends the transfer to the seller for his execution of it. The seller's broker passes on the executed transfer to the buyer's broker, who sends it to the buyer for his execution, and when it is thus completed the buyer's broker sends it to the company's secretary. When he is satisfied that all is in order, he registers the new shareholder and issues a new certificate to him.

[1] *Ireland* v. *Hart*, 1902, 1 Ch., 522.

Share Certificates.—A share certificate is only a representation that the person named therein is the owner of the shares for which it is issued. If the transfer on which the certificate was issued was forged, the transferee gets no title to the shares so transferred, but the certificate may be binding by estoppel, and the company may be precluded from disputing the purchaser's right to be registered; and if the company cannot register the purchaser as shareholder in respect of the shares comprised in the certificate, it must pay him as damages the value of the shares at the time of refusal to register.

Liability of Past Shareholders.—The normal way in which a person ceases to be a shareholder is by transfer to another person. If the shares are not fully paid, the transferor is in the position of surety for the transferee for a year from the date of the transferor ceasing to be a shareholder—that is to say, if within such year a call is made on the transferee and he is not able to pay, then the transferor, though no longer a shareholder, has to pay the call. It has already been pointed out that this is a survival from the earlier conceptions of a joint-stock company.

Debentures by way of Floating Security. — A limited company can mortgage or charge its property, when it has power to borrow money, just as an individual can, but it has also power to create what is known as "a floating security," or "a floating charge." That term had been known for some time as a colloquial description of a charge or security which did not interfere with the free disposal of the company's assets in the usual course of its business, although such assets were covered by the charge. But it was not till the Companies Act, 1900, was passed that we find the words used in an Act of

Parliament, and even then the Act did not define them. The Court of Appeal, in a recent case,[1] without attempting a precise definition, accepted the following rules: A charge is a floating charge, within sec. 14 of the Companies Act, 1900, (1) if it is a charge on a class of assets, both present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if it is contemplated by the charge that, until some future step is taken by or on behalf of the mortgagee, the company may carry on its business in the ordinary way so far as concerns the particular class of assets charged. A debenture holder who has a floating security is a very privileged person, as he can put an end to its "floating" by the appointment of a receiver if the property subject to the debentures is in jeopardy, and can by so doing obtain priority over all unsecured creditors. This is clearly shown by the decision and judgment in a recent case.[2] The head-note was as follows: "Debenture holders, who have a floating security upon the undertaking, and all the property, present and future, of a company, are entitled to the appointment of a receiver of the property subject to the debentures if their security is in jeopardy, although nothing is payable in respect of principle or interest, and there has been no default or breach of contract by the company." Buckley J. said: "The jeopardy consists in the fact that a creditor has issued a writ and signed judgment, and is in a position to issue execution. . . . The cases are numerous in which the undertaking of a limited company is so loaded with debentures that

[1] In re *Yorkshire Woolcombers' Association, Ltd.*, 1903, 2 Ch., 284.

[2] In re *London Pressed Hinge Co.*, 1905, 1 Ch., 576.

the profits are barely sufficient, and perhaps not sufficient, to keep down the debenture interest, and that, if the company is wound up, there is nothing for anyone but the debenture holders. In short, the facts often are that the undertaking is substantially carried on only for the benefit of the debenture holders, who have a floating security over it. In this state of facts money is lent or goods consigned to the company in respect of which a debt accrues to a creditor; and so long as the security floats, as it is termed, and no receiver is appointed, the creditor has a possibility or expectation of being paid by the company; for, as between the company and the debenture holders, the former may pay in the ordinary course of business. But directly a receiver is appointed, this expectation of the creditor is intercepted. He may have lent his money or consigned his goods to the company last week; but if he has the audacity to ask payment, and to enforce his legal remedies to obtain it, the debenture holder obtains a receiver in a proceeding to which the execution creditor is not a party, and thus closes the door against him, taking his money and his goods as part of the security, and leaving the creditor who supplied the money and the goods to go unpaid. I regret to be driven to the conclusion that, as the law stands, those are the rights of a debenture holder entitled to a floating charge."

A sole trader or a partnership who attempted to give a similar security would find himself in considerable legal difficulties. In the first place, a charge on stock-in-trade would have to be registered as a bill of sale, and its registration as such would be most damaging to the trader's reputation. Then, a bill of sale must contain a schedule of the property comprised in the bill

of sale, so that one set of goods could not be substituted for another in the ordinary course of the business, and this is of the essence of a floating security. This, therefore, is an important legal and practical difference between a trading company under the Companies Acts and a trading partnership or individual.

Under secs. 14 to 18 of the Companies Act, 1900, registration of these debentures is required, and the register is kept by the Registrar of Joint-Stock Companies, and is open to inspection. If a creditor is careful enough to search the register, he has warning of the risks he may be running.

CHAPTER VII

MONEY AND BANK-NOTES

Coined money—British coins—Legal tender—Token money—Paper money—History of bank-notes—Negotiability of bank-notes—Banks of issue—The Bank Charter Act—Bank-notes as legal tender—Endorsement of notes—Dishonoured note—Lost or stolen notes—Forged or altered notes—Liability of banks of issue.

MOST of my readers, when at school, will have had practical experience of the limitations of barter or "swopping," and will have learnt that it is more convenient and more just to exchange articles for money than for other articles. Barter is the most ancient form of trading, but it has given place amongst civilized peoples to sale and purchase at a money value. The price of goods in commercial transactions is payable in coin, or bank-notes, or by cheque or bill of exchange, and we must proceed to consider these in turn.

Coined Money.—When we say of a picture that it is worth £150, or of a carpet that it will cost £10, or of a man that he is possessed of £250,000, what is it that we mean? We mean that in return for the picture the owner can get 150 little pieces of gold, of a certain shape and weight, and bearing on each side a stamped device; that to buy the carpet ten of these pieces of

gold must be given; and that if the man chose to sell all his possessions, he would get for them 250,000, or thereabouts, of these gold pieces. These gold pieces are therefore a standard or measure of value to which we can refer all articles of commerce. Money need not necessarily be of gold or even of metal; cowry shells, cubes of tea, and blocks of rock salt, have all been used as money. The Latin word for money, *pecunia*, from which we get our word "pecuniary," shows that in the early days of Rome cattle constituted the standard of value. Almost all nations have, however, at a very early period, fixed upon certain metals, and especially gold and silver, to serve this purpose. These metals have certain qualities which make them particularly useful as money. They are easily divisible, they do not deteriorate by keeping, and when pure they are always of the same quality. Coining is merely the process by which the metal is divided into convenient portions, bearing a recognized proportion to one another. For obvious reasons Governments have found it advantageous to take this operation into their own hands, and to exclude private persons from coining. Our English word "money" means that which is minted or coined, and is derived through the French from the Latin *monēta*, a surname of Juno, in whose temple at Rome money was coined. Our word "mint," the place where money is coined by the State, is derived from the same source.

British Coins.—British money is coined from gold, silver, and copper, but gold is the only standard metal. Legal coins are issued from the Mint, and from no other source. The Coinage Act, 1870, empowered the Queen in Privy Council to establish branch mints in the Colonies, and under this power we get a large number of sovereigns from Sydney, Melbourne, and Perth. This

Act also regulates the devices and names of coins, and within recent years the issue of fourpenny pieces has been discontinued, and of the double florin begun. Under the same Act every person has the right to have gold bullion, if of sufficient fineness, coined at the Mint, free of any charges for assaying the metal, coining it, or for waste in coinage, at the rate of £3 17s. 10½d. per ounce of standard gold. The privilege is not of great practical importance, as the owner of the gold loses the use of it when it is being coined; and it is more convenient to exercise the alternative right under the Bank Charter Act of exchanging gold bullion, subject to the expense of melting and assaying it, at the issue department of the Bank of England, for Bank of England notes, at the rate of £3 17s. 9d. per ounce of standard gold. The bank-notes can be exchanged at once for sovereigns in the same department.

Legal Tender.—We have said that gold is the only standard metal, but as gold cannot be used for the payment of small debts—the smallest English gold coin being the ten-shilling piece—as a matter of convenience, both silver and copper coins are recognized as a medium for legal payment up to limited amounts. A man is said to make a legal tender when he tenders the exact amount of his debt to the creditor in such money that the creditor puts himself in the wrong if he refuses to take the money offered. Gold is a legal tender without limit, silver is a legal tender up to two pounds, and copper up to one shilling.

A new sovereign weighs 123·27447 grains, and remains a legal coin until reduced by wear below a weight of 122·5 grains. Any person has power by law to smash a light coin, but except at banks light coins do not get smashed, and pass current for all ordinary purposes.

Special Acts of Parliament have had to be passed when there have been too many old, light coins in circulation, in order to get these coins withdrawn.

Coins and Token Money.—From what has already been said, it will be clear that a sovereign has a value as a piece of gold, and could be melted down with other sovereigns into bullion without appreciable loss. This is not true of silver and copper coins. There are 66 shillings in 12 ounces of standard silver, which, at 2s. 6d. an ounce, gives a market value of less than 6d. for the shilling. Thus, our silver coins (and the same applies to copper coins also) are tokens of a value considerably greater than their market value as pieces of silver.

Paper Money.—There is something else which in England is treated as money—namely, a bank-note. It is obvious that a bank-note is not money in the sense in which coin is money, because the paper of which it is made is not valuable in the way that a sovereign is valuable. It is therefore the promise written on the note that is of value. In some foreign countries bank-notes are issued by the Government, which will accept them in payment of taxes, but will not exchange them for gold. Such paper money is called inconvertible. The distinguishing characteristics of English bank-notes are that they are not issued by the Government, and are strictly convertible.

History of Bank-notes.—A bank-note was originally what the name signifies, a note or receipt given in exchange for money deposited. The earliest English bankers were goldsmiths, who, in the times of commotion preceding the Commonwealth, received the money of their clients under a promise to repay it, with interest, upon the demand of the client. The receipt of money, under a liability to repay it upon demand, is still the basis of

banking. The device of issuing promises for even sums of money—*e.g.*, £5, £10, etc.—was an obvious one.

The second stage in the use of bank-notes was their issue by way of loan. When the first goldsmith or banker discovered that on an average only a percentage of the money entrusted to him was required at a given time, and that, while his credit remained good, he could promise to pay on demand very much larger sums than he actually had in cash, banking was established as a lucrative trade. For instance, let us suppose an early banker had been entrusted by his customers with the custody of £100,000 in gold, and that against this he had issued bank-notes for £100,000. He finds that if he keeps £30,000 in gold he always has enough gold to meet the demands made upon him, because, while some of his customers come for payment, others leave their money with him, or even bring more gold. What is he to do with the £70,000 balance? He soon finds that other customers come to borrow instead of to deposit. He accordingly lends them money, not in gold, but in more bank-notes. Experience teaches him that he can issue at ordinary times, say, £300,000 worth of bank-notes, either to his depositing customers or to his borrowing customers, without being asked to cash more than £100,000 at any one time. As he receives a higher rate of interest on his loans than he gives on the money deposited with him, he stands to make a considerable profit. The larger the proportion of bank-notes to gold, the larger is his profit, but so also is his risk of some day finding himself unable to meet a greater demand than usual for cash in exchange for his notes. For about 100 years prior to 1780 banking meant the receipt of money coupled with the issue of bank-notes payable on demand.

Negotiability of Bank-notes.—The question naturally arises how these bank-notes were kept in circulation. The answer is that they proved to be a convenience, and while the banker's credit remained good most people were willing to take any risk there was of the bank stopping payment. The customer did not merely hoard his roll of notes in a secret drawer, but began to pay his debts with them. When he wanted to pay his butcher's bill, instead of going to the bank, getting gold in the place of the banker's notes, and then paying the butcher in gold, he paid the butcher in notes, and left him to get gold from the bank, or to part with the notes to some other person. This seems a perfectly elementary proceeding to us, but it was quite a novelty 200 years or so ago. The question which was then vexing lawyers and business men was whether these promissory notes given by bankers were or were not "negotiable instruments."

The kind of difficulty that arose was this: A banker issues a bank-note to customer A, and after passing through several hands, the note is presented for payment by X, who is a complete stranger to A, and does not even know that it was issued to A. Can the banker safely pay X, and what will be his position if A afterwards come and says that the note was stolen from him, and that he is still the owner of it, and either demands to have it again or its money value? If the bank-note was merely evidence of a debt owed by the banker to A, then A remains unpaid, and can claim to be paid. On the other hand, if the bank-note was a "negotiable instrument," like a bill of exchange to bearer, then it could pass from hand to hand, and X, if he gave value for it, and did not know it had been stolen, could give the banker a valid discharge. We shall have more to

say about the characteristics of negotiable instruments hereafter; it is enough for our present purpose to know that in 1704 an Act was passed declaring that promissory notes were like bills of exchange. The effect of this was to make them transferable by delivery, so that a *bonâ fide* holder for value obtained a good title, and could sue in his own name. They speedily became part of the currency of the country, and in 1758 Lord Mansfield said of them:[1] "Bank-notes are not goods nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash . . . they are never considered as securities for money, but as money itself. On payment of them receipts are always given as for money, not as for securities or notes."

Banks of Issue.—At first there was no restriction on the issue of notes, and anyone with sufficient credit could set up as a banker, and issue his promises in the form of bank-notes. But before the year 1704, when, as we have seen, the nature of bank-notes was finally determined, the value of a note issue had been noticed, and attempts made to monopolize it. In 1694 the Bank of England obtained its charter in return for a loan to the Government of £1,200,000. The original charter gave it no exclusive privilege, but the threatened competition of a National Land Bank caused the Bank of England, in 1697, to secure the privilege of being the only bank which was to "be created or established,

[1] *Miller* v. *Race*, 1 Burr., 452.

permitted, suffered, countenanced, or allowed by *Act of Parliament*, within this kingdom." This secured the Bank against the competition of similar corporations, but did not protect it against the rivalry of private individuals, either alone or in partnership. In 1708 the Bank secured a further monopoly by an enactment which rendered it unlawful for any body "politic or corporate whatsoever, erected or to be erected, other than the Bank of England, or for other persons whatsoever, united or to be united in covenants or partnership exceeding the number of six persons in England, to borrow, owe, or take up any sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof." For more than a century this, with immaterial alterations, remained law. A bank with the right to issue notes is technically called a bank of issue.

At the beginning of the nineteenth century several causes were at work all tending to an alteration of the law. One of these was the introduction of cheques, as to which more will be said hereafter. It is sufficient for us to note here that the use of cheques made it possible for a bank to carry on its business without the issue of bank-notes. Another cause was the inadequacy of the security offered by many of the small private banks. The payment of Bank of England notes in specie had been suspended, owing to the French wars, in 1797. Before long, gold began to go to a premium. In 1801, the value of gold rose to £4 5s. per ounce, or a premium of about 10 per cent. In 1809, there were 721 country banks, having a total note issue of £30,000,000, and in that year gold rose to £4 11s. per ounce. In 1813, gold had reached the price of £5 10s. per ounce, or a premium of over 40 per

cent. In 1816, 89 country banks stopped payment, and the private note issue of the country was at once reduced one-half. In the next crisis of 1825 there were 76 bank failures.

In 1826 two Acts were passed, one restricting for three years the issue of bank-notes under £5, and the other permitting an extension of banking copartnerships. The former Act has been renewed from time to time, and bank-notes under £5 have not been legal in England since it was passed. The latter Act involved a relinquishment by the Bank of England of part of its privileges, but that bank still retained its old rights in London and the surrounding country. It was enacted that it should be lawful for any bodies politic or corporate with more than six members, and for copartnerships of more than six persons, to carry on business as bankers in England, provided that they had no establishment as bankers in London, or within sixty-five miles of it, and that the liability of all members or partners was unlimited.

The Bank Charter Act.—It was found that the evils of an unrestricted note issue were not removed by the abolition of small notes or an increase in the size of banking copartnerships, and in the years 1844 and 1845 Sir Robert Peel made a great attempt to deal with the currency question in all parts of the United Kingdom. The general aim of the legislation of those years was to establish the current circulation of bank-notes as a maximum circulation so far as the payments of notes depended on the credit of the issuing institutions, and to allow an excess over that maximum only when gold coin or gold or silver bullion was held against any excess liability on notes. In England, the only bank allowed to issue against gold coin or gold or silver bullion was

the Bank of England. Somewhat different regulations were made for Scotland and Ireland.

The English Act is known as the Bank Charter Act, and was passed in the year 1844. It still regulates the note issue both of country banks and the Bank of England. The Act provided for the restriction of the issues of these banks, and for a continuation of the modified monopoly of the Bank of England. After its passing, there were to be no new banks of issue in any part of the United Kingdom; but, in England, a banker who on May 6, 1844, was lawfully issuing his own bank-notes might continue to issue notes to an average amount not exceeding his average issue as determined by the actual issue of his bank for twelve weeks before the passing of the Act. The effect of this is that there are to-day three local rings, with London as centre, in which the rights of issue differ—viz.: (*a*) the City of London and three miles round, in which the Bank of England has a complete monopoly; (*b*) the district more than three, but less than sixty-five, miles from London, in which the monopoly is divided between the Bank of England and banking firms of not more than six members lawfully issuing notes on May 6, 1844; and (*c*) the district more than sixty-five miles from London, in which the monopoly is divided between the Bank of England and private and joint-stock banks lawfully issuing notes on May 6, 1844.

A bank was to lose its right of issue by ceasing to exercise it; and if restricted by law to a membership not exceeding six, by bringing its number of members above six; and if without restriction as to the number of its members, by establishing a place of business in London or within sixty-five miles of it. Bank of England notes were to be issued from a separate depart-

ment, called the Issue Department. This department might issue notes to the extent of £14,000,000 against public securities, and, beyond that sum, might issue notes in exchange for gold coin or gold or silver bullion. If a banker ceased to issue notes provision was made for empowering the Bank of England to increase its issue of notes against public securities by two-thirds of the amount of the discontinued issue. Under these provisions the notes of banks other than the Bank of England are rapidly diminishing. At the time when the Bank Charter Act took effect there were 72 joint-stock banks of issue, with an aggregate authorized circulation of £3,478,230, and 207 private banks of issue, with an aggregate authorized circulation of £5,153,417, or a total of 279 banks, with an authorized issue of £8,631,647. In May, 1906, the number of banks of issue was 31, and their authorized issue was £1,628,342, and their actual issue £584,847. On the other hand, the issue of the Bank of England against public securities has increased from £14,000,000 to £18,450,000. On April 6, 1906, there was a further issue against gold coin and bullion of £35,407,300. Of the £53,857,300 of notes actually issued on that date from the Issue Department, notes for £24,678,655 were still in the Banking Department, and notes for £29,178,635 were actually in circulation in the country.

On three occasions since the passing of the Bank Charter Act it has been found necessary to set aside temporarily the restrictions on the issue of Bank of England notes, by allowing the bank to issue notes in excess of its authorized issue without depositing a corresponding amount of gold coin or bullion in the Issue Department. This is usually spoken of as "Suspension of the Bank Act." It was done in each case, not by

fresh legislation, but by the Government of the day authorizing the bank to exceed its legal limits of issue. The years in which this was found necessary were 1847, 1857, and 1866.

Bank-notes as Legal Tender.—A Bank of England note, so long as the bank continues to pay gold on demand for its notes, is a legal tender in England, but not in Scotland or Ireland. But Bank of England notes may circulate in those countries, and a creditor objecting to a tender of payment must state that he refuses a tender of Bank of England notes, if that is his real reason. As it is a requisite of a legal tender that the exact sum must be tendered without requiring change, it follows that a Bank of England note cannot legally be tendered in payment of a debt less than £5.

The Bank of England cannot make a legal tender of its notes in payment of its own debts.

Country notes are not, strictly speaking, a legal tender, but they become so unless, at the time of the tender, objection is made to the receipt of them on the ground that they are not cash, but only promissory notes.

If, for instance, A is owed £7 10s. by B, but thinks he is entitled to £8. B offers A a country bank-note for £5, and £2 10s. in gold. A refuses to accept on the ground of insufficiency, but takes no objection to the note being a country one. A then sues B for £8, and B pays £7 10s. into court and pleads a legal tender of that amount. On B proving that only £7 10s. was due, A cannot object to B's tender on the ground that a country note was tendered. A will have to pay costs from the date of B's tender.

Indorsement of Notes.—It is quite legal to transfer a note by indorsement and delivery, as well as by delivery.

In such a case a *bonâ fide* holder for value can recover the amount of the note from any indorser, and such indorser can, in his turn, recover its amount from a prior indorser. Where a note is a legal tender, the person to whom it is offered cannot oblige the person offering it to indorse it, but in all other cases (*e.g.*, where he is asked to give change) he can exact indorsement as a condition upon which he will receive the note in payment.

Dishonoured Note.—The transferee of a bank-note, which is subsequently dishonoured,[1] can recover the amount of the note from the transferor provided (*a*) that the transferee has not been negligent, or (*b*) that he did not accept the note as part of a sale of goods for cash.

(*a*) The holder of a bank-note, being the holder of an instrument payable on demand, has a duty cast upon him of presenting the note for payment within a reasonable time, or, within a like time, of transferring it to some one else—*i.e.*, of circulating it. A reasonable time for presentment or circulation is not later than the day after its receipt. Notice of the dishonour of a note must always be given by the transferee to the transferor within a reasonable time—that is, in general, within the day after the transferee has reason to give such notice.

(*b*) This rule as to payment by bank-notes only applies to payments made at the actual time of the purchase and sale, for subsequent payments are treated as payments of past debts, and in the case of payment of past debts, whether the payment is by bank-note, or cheque, or bill of exchange, it is presumed to be only conditional.

[1] A note is dishonoured when the bank which has issued it fails to pay it on presentment.

Lost or Stolen Notes.—As a bank-note is a negotiable instrument, a person can, by delivery of it, give to a *bonâ fide* transferee for value a better title than he himself has. Thus, if A loses a £5 Bank of England note, which B finds and uses to pay his rent to C, if C takes the note without notice that it is a lost one, C becomes absolutely entitled to it, and A cannot recover either the note or its value from C. The same rule holds good in favour of a *bonâ fide* holder for value in the case of stolen notes. It should, however, be noticed that while a thief has no title to a note stolen by him, the innocent finder of a note is in the position of an owner as against the whole world except the person who lost it. Thus, in the example just given, A can claim the note or its value from B, but, except as against A, B has a good title. B can sue the maker upon it, and so also can persons deriving their title from him, even with notice of the loss. In the case of a lost note being found on private property, the owner of the property is the person entitled to possession of the note, and not the finder.

If a note is lost and not found, the loser, on giving an indemnity to the satisfaction of the Court against the claim of any other person on the note, can sue the issuer of the note.

When it has been proved that a particular bank-note has been stolen, the burden of proof is on the holder to prove both that value has been given, and that it has been given in good faith without notice of the theft, either by the holder himself or by some person through whom the holder claims, and who has taken the note subsequently to the theft. Thus, if B steals a £5 note from A, and uses it to pay his rent to C, who takes without notice of the theft, and makes a present of the note to D, on the theft being proved, it is enough for D

to prove that C took for value and without notice. The fact that he himself is not a holder for value is immaterial.

The effect of "stopping" bank-notes is not to make the note valueless: it is only an intimation to the banker not to pay without full inquiry. Thus, if A stops payment of the note that B has stolen, D may be put on proof of his title, but on his proving that C took the note for value and without notice, and then gave him the note, the Bank must pay D. In the case of Bank of England notes, it is a means of advertising the fact that the notes have been lost or stolen, for the numbers of stopped notes are circulated from time to time amongst money-changers and other persons likely to be asked to receive them.

Forged or Altered Notes.—A forged note is a piece of waste-paper so far as value is concerned. A transferor, by delivery of a note, warrants to his immediate transferee, being a holder for value, that the note is what it purports to be. Therefore, if A delivers to B a forged note, B can recover from A what he may have paid him for the note.

At common law a material alteration in a bank-note, without the assent of the issuing bank, makes the instrument void and worthless. Thus, the alteration of the number of a Bank of England note to prevent its identification as a stolen note has been held to make the note valueless. There is a statutory exception to this rule, but it has been held not to apply to Bank of England notes, but only to country bank-notes. It covers the case of a material alteration which is not apparent, and leaves the note in the hands of a *bonâ fide* holder for value good for the amount for which it was originally issued. Thus, a country bank-note for £5, altered so

cleverly as to read for £50, could be enforced by a *bonâ fide* holder for value to the extent of £5.

Liability of Banks of Issue.—Bank-notes cannot be kept in circulation unless the bank which has issued them is of good credit. At the time when the Bank Charter Act was passed, the liability of all the country banks which were then issuing notes was unlimited. Since that date many of these banks have become limited companies under the Companies Act, 1862, but the members of such a bank continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company. Thus, the holders of bank-notes have a greater security for payment than the ordinary creditors of a bank, and only stand to lose money in case the calls on the shareholders reduce the whole of the shareholders to bankruptcy.

CHAPTER VIII

CHEQUES

Origin of cheques—The use of "order" cheques—Position of banker on whom cheque is drawn—Forgery of customer's signature—Forgery of indorsement—Negligence of customer—Operation of cheque—Countermand of payment—Material alteration—Collection of cheques—Diligence in collection—Clearing-house customs—Payment and receipt of money—Crossed cheques.

The Origin of Cheques.—A bank-note, as we have seen, was found to be a convenient commercial instrument for two reasons: first, it was payable on demand; and, secondly, it was transferable from hand to hand by delivery without indorsement. On the other hand, bank-notes were always issued for even pounds, and the owner ran the risk of losing them or having them stolen. About the year 1780 it became the custom for a banker to hand a customer, not a roll of bank-notes, but a book of order forms to bearer on demand, and the bank undertook to honour such orders so long as they had assets of the drawer in their hands. This obligation to honour a customer's cheques to the extent of the balance to his credit is fundamental. The issue of cheques did not mean that the issue of bank-notes was given up. Bank-notes were now issued, not in amounts equivalent

to the customer's deposit, but merely to the extent of the express demand for them. "These order forms were 'to bearer' and 'on demand,' in imitation of the notes which they were intended to supersede. And just as the promissory notes bore registered numbers for ready verification when the note was presented for payment, so these books of forms bore registered numbers as a 'check' or means of verification, if, when the order should come to be presented for payment, there should be any doubt of its genuineness. The books came to be called check-books, and the forms 'checks,' and you are familiar with the consecutive registered numbers which these books bear on the counterfoils and on the order forms to the present day. The paying banker is thus enabled to see, by a glance at the record in his possession, to whom was originally issued the book of forms from which the order form presented to him has been detached."[1]

The advantages of a cheque over a bank-note are that a cheque, until filled up, is of no value, and that it can be drawn for the exact amount required. Cheques being negotiable soon became very popular instruments, and a special system of exchanging cheques between bankers, known as the clearing-house system, has enabled cheques to an enormous aggregate amount to be dealt with very simply and quickly. We shall have something more to say as to this system.

The Use of "Order" Cheques.—A cheque payable to "John Smith or order," instead of to "John Smith or bearer," must have John Smith's name written (technically "indorsed") on the back of the cheque, to show that John Smith orders payment to the bearer. This is, of course, a great protection against fraud, for the

[1] Loyd, p. 111.

writing of John Smith's name by another person without his authority is forgery. But order cheques were practically unknown until 1853, because from 1782 onwards bills of exchange, including cheques, were liable to an *ad valorem* stamp duty, with an exception in favour of bearer cheques. In 1853 drafts on a banker payable to order on demand were rendered valid to any amount if stamped with a penny stamp, and in 1858 bearer cheques were deprived of their exemption, and subjected to a similar penny-stamp duty. As soon as the Bill of 1853 was introduced, it was seen that its passing would greatly increase the number of drafts requiring indorsement, and a section was inserted in the Act of 1853 to protect a banker who paid a cheque bearing a forged indorsement. Further reference will be made to this and other sections protecting bankers. But before examining these and the complications arising from the use of crossed cheques, let us look at the legal incidents commonly arising from the use of a cheque pure and simple.

Position of Banker on whom Cheque is drawn.—The banker with whom a customer has an account is under an obligation to honour the drafts of his customer to the extent of the customer's balance. A banker is bound by law to pay a cheque drawn by a customer within a reasonable time after the banker has received sufficient funds belonging to the customer. Thus,[1] where the customer paid in a Bank of England note for £40 to his account in the morning, and in the afternoon drew against this amount, and payment of the cheque was refused by a clerk who was unaware of the payment in, it was held that the customer was entitled to damages from the Bank.

[1] *Marzetti* v. *Williams*, 1830, 1 B. and A., 415.

Provided that the balance is sufficient, there is only one case in which a banker should not honour his customer's cheque, and that is when the customer is attempting to deal with the money so as to commit a breach of trust, and the banker, by honouring the cheque, would become a party to such breach.

If a banker wrongly refuses to honour his customer's cheque, the customer is entitled to substantial, but temperate, damages, such as will be a reasonable compensation for the injury which he must have sustained from the dishonour of his cheque.

The converse to the general rule just given is also true, except so far as modified by statute—namely, that the banker is bound not to pay away his customer's money except upon his cheque or other order, and is liable to his customer for payments made to third persons if not authorized by the customer. The banker pays a person not really entitled to the customer's money—(*a*) where he is deceived by a forgery of the drawer's signature; and (*b*) where he is deceived by a forgery of the payee's indorsement or some subsequent indorsement. Where a cheque is payable to bearer (either as originally drawn or after indorsement by the payee), and has been lost or stolen, the banker in paying it to the bearer is only obeying the directions of the customer who drew the cheque, and such customer cannot complain. The drawer can, of course, sue any person who had a defective title to the cheque, but not a person who took it for value and without notice of the defect in title. Thus, we are only concerned with the two cases of forgery given above.

Forgery of Customer's Signature.—A banker is bound to know his customer's signature. If the signature of the drawer of a cheque is forged, the banker cannot charge

the customer, whose name is forged, with the amount of the cheque. The only exception to this is when the circumstances are such that the customer is estopped or precluded from saying that the forged signature is not his signature.

Forgery of Indorsement.—At common law the banker who paid on a forged indorsement, either of the payee or some subsequent holder, could not charge his customer with such payment. But while a banker can, to some extent, protect himself against forgery of his customer's signature by keeping a book in which the customer signs his name in the style he is going to use in drawing cheques, no such precaution can be used as regards payees or other subsequent indorsers of cheques, for they may be absolute strangers to the paying banker. Two statutes have relieved the banker of his common-law liability. Sec. 19 of the Stamp Act, 1853, enacts that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof."

Sec. 60 of the Bills of Exchange Act, 1882, is to the same effect, but its language is somewhat different. "When a bill payable to order on demand is drawn on a banker (viz., a cheque), and the banker on whom it is drawn pays the bill in good faith and in the ordinary

course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

It should be noted that the statute is only a protection to the banker on whom the cheque is drawn, and does not take away such rights as the drawer of the cheque may have against other parties. Thus, suppose Jones draws an uncrossed cheque payable to Smith's order. Jones's clerk steals the cheque, forges Smith's indorsement, and uses the cheque to pay for goods which he buys of Robinson, who has no knowledge of the forgery. Robinson pays the cheque into his bankers, where his account is overdrawn, and Robinson's bankers receive payment of the cheque from Jones's bankers. Jones's bankers may debit Jones with the payment, but Jones may sue either Robinson or Robinson's bankers for the value of the cheque.

Negligence of Customer.—A customer may have so negligently conducted himself that the Courts will not allow him to say that a payment wrongly made by the banker was not a payment made on his account. This is called estoppel by negligence. Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the banker into mistake, and also must be the neglect of some duty which is owing to the banker or to the general public. Thus,[1] it has been held that where a cheque is sent from abroad without any separate letter of advice, even if such action is negligent, it is negligence in a collateral matter, and

[1] *Arnold* v. *Cheque Bank*, 1876, 1 C.P.D., 578.

does not preclude the customer from complaining of a wrongful payment. A case[1] decided nearly eighty years ago was for long supposed to be an authority for the proposition that carelessness in drawing a cheque was a ground for this estoppel, but it has now been definitely decided[2] that the customer of a bank who so draws a cheque that a forger is able to insert words and figures increasing the amount is not liable to the bank for the loss sustained in paying the increased amount. But where a customer of a bank entrusts another person with a signed cheque, and, at the same time, authorizes that other to fill up the amount which the banker is to pay, the banker is entitled to debit the customer's account with the amount which may be filled in on the cheque, although the fact be that the customer limited the authority of the person to whom he entrusted the cheque to an authority to fill it up for a less sum than that appearing on the face of the cheque.

Operation of Cheque.—A cheque does not operate as an assignment of the drawer's funds, nor is there any privity between the payee and the banker, and if the banker wrongly dishonours the cheque, it is the customer who drew the cheque, and not the payee, who has the right of action against the banker. The holder of the unpaid cheque may, of course, sue the customer who drew the cheque, whether the banker is in fault or not.

Countermand of Payment.—The duty and authority of a banker to pay a cheque drawn on him by a customer are determined by (1) countermand of payment, and (2) notice of the customer's death. A countermanded cheque is said to be "stopped." A banker refusing

[1] *Young* v. *Grote*, 4 Bing., 253.

[2] *Colonial Bank of Australasia* v. *Marshall and Day*, 75 L.J.P.C., 76.

payment of a "stopped" cheque is under no liability. As we have already seen, he is under no liability to the payee or holder of the cheque, and as he is acting under the order of his customer, he is under no liability to him. The drawer of the cheque will be liable to a *bonâ fide* holder for value of the cheque, so long as the holder is not claiming through a forged indorsement.

Countermand of payment may be expressed by conduct, as by tearing up the cheque. Thus,[1] where a cheque was presented which had been torn in pieces and pasted on a sheet of paper, and the banker paid it without inquiry, it was held, on proof that the customer had torn it up and thrown it away, that the banker was liable for the amount. And, generally, if suspicious circumstances are brought to a banker's notice, he should make inquiry into them.

On notice of an available act of bankruptcy on the part of the customer, the banker must refuse to honour the customer's cheques.

Material Alteration.—A material alteration made in a cheque renders it void. There is a partial exception where the alteration is not apparent, and the cheque is in the hands of a *bonâ fide* holder for value, in which case the holder may avail himself of the cheque as if it had not been altered, and may enforce payment of it according to its original tenor. Alterations of the date or the sum payable are material alterations.

Collection of Cheques.—So far, we have considered the drawing of cheques by the customer, and their payment by the customer's banker, on whom they are drawn. As a rule they will not be paid to the payee himself, but to the payee's banker, or to the banker of some

[1] *Scholey* v. *Ramsbottom*, 2 Camp., 485.

indorsee who has taken the cheque from the payee or a subsequent indorsee. We must therefore consider the collection as well as the payment of cheques.

Sometimes a banker acts merely as an agent for collection, and does not allow his customers to draw against cheques paid in until he knows that they have been paid by the paying banker. More usually the banker at once credits his customer with the face value of the cheque paid into his account, and the customer is then at once entitled to draw on it. In this case the banker becomes holder for value of the cheque. If the cheque is dishonoured, and the banker has shown due diligence, he can debit the customer's account with the amount. The practice of bankers is not to sue the drawer of a cheque if it is dishonoured, but to return it to the customer, unless the customer's account is overdrawn; but their right to sue is not dependent on the state of the account.

Diligence in Collection.—A banker who receives a cheque for the purpose of collection is bound to use due diligence in getting it paid. In general, the banker has the day after the receipt of a cheque to present it for payment to the banker on whom it is drawn. If the two bankers are not in the same town, the collecting banker is only bound to send it to his agent for presentment by the post of the day after that on which he has received it, and the agent has the following day to present it for payment. It is now the usual practice to send such cheques through the country clearing-house in London; and, as long as that process does not consume more than the two days allowed, the customer cannot complain. Nor does the fact that presentment is in that way made through the post invalidate the presentment.

If the collecting bank, on receiving notice of dishonour, gives notice of dishonour to its customer on or before the day following that on which the cheque was dishonoured, the bank is entitled, if they have credited the customer with the amount of the cheque, thereupon to debit him with such amount.

Clearing-house Customs.—There are two clearing-houses in London—one for the country banks for which the London banks are acting as agents, called the country clearing-house, and the other for the London banks themselves. In some of the larger provincial towns there are also clearing-houses. The usual mode in which cheques are passed through the country clearing-house seems to be this: The collecting bank, A, forwards the cheque to its town agent, B. The town agent, B, sends the cheque to the clearing-house, where it comes into the hands of the London bank, C, printed on the cheque as the agent of the paying bank, D. This latter bank, C, does not at once give credit for the cheque, because it has no means of knowing the state of the drawer's account at its principal's, D, but on the same day forwards it to its principal's, D, the paying bank. If the cheque is honoured, the paying bank, D, at once instructs its London agents, C, to credit B with the amount. On the receipt of this advice by C, the day's accounts are made up on the footing that the amount of the cheque is payable by C to B. As soon as the day's accounts are settled by the necessary drafts, B has been paid, and whether A, the collecting bank, gets the money or no, the customer is entitled to the amount of the cheque as against his banker, A. If the cheque is dishonoured, D, the paying bank, should return it at once to A, the collecting bank.

The custom of the London clearing-house on these

points has been recently described as follows[1]: "The desks of the banks are placed in alphabetical order, so that the clerks can pass round the room and deliver the 'charges' without confusion or risk of error. In describing the operations it is necessary to use technical terms, and to remember that the 'out' and the 'in' clearing comprise the same items, having regard to their presentation by one bank and their reception for payment by another. Thus, the 'out' clearing of each bank—*i.e.*, the cheques, etc., for which each bank has to receive payment—becomes part of the 'in' clearing of every other bank—*i.e.*, the cheques, etc., which every other bank has to pay. The 'out' clearing is taken down at the bank offices in sheets or books in separate 'charges,' according to the bankers drawn upon, whilst the 'in' clearing is taken down in the same way at the clearing-house by clerks who go there for the purpose.

"The first 'clearing' is held from 10.30 a.m. till 12 noon, all drafts having to be delivered at the desks by 11. The clerks receiving the 'charges' enter the items in their 'in' clearing-books, and cast them, agreeing the totals with amounts placed on the back of the last cheque. When this is completed, the clerks leave the house, taking the drafts to their respective offices. No balances are struck for this clearing, the total of each 'charge' being carried forward to the beginning of the second clearing. This opens at 2.30 and continues until 4, when the last delivery must be made. The arrangements differ from those of the morning clearing only in the fact that the deliveries are continuous and frequent throughout the afternoon. At 4 the doors of the house are closed, and no more drafts can be presented. As soon as the last drafts have been dispatched from the

[1] "Dictionary of Political Economy," vol. i., p. 306.

banks, the 'out' books are cast close and sent down to the house, to be agreed with the 'in' books of the other banks. Differences in adding the figures together are rectified by the bank in error, but differences in items are altered by the 'out' clearers to agree with the 'in' clearers. Subsequently the difference may be reclaimed by production of the draft. Drafts refused payment are returned at any time during the afternoon by inclusion in the 'out' charges to the bank by whom they were presented. 'Returns' are also received at the house after the close of the clearing and up to 5 p.m. The totals having been agreed, the balance between the 'out' and the 'in' amounts is struck by each bank with every other one, and the last 'returns' are charged and allowed on either side. All these balances then form items in a general balance-sheet, which is prepared by the head clearer of each bank, and shows at foot the final balance which his bank has either to pay or receive. This balance is settled with the clearing-house by means of transfers made at the Bank of England between the clearing-house account and those of the various banks. Of course, if the final balance-sheets are all correctly made out, the total of the transfers to the credit of the clearing-house will exactly equal the total of the amounts transferred from that account to those of the creditor banks. Errors are charged or credited to the banks in the next day's clearing."

Payment and Receipt of Money.—The simplest case of the payment of money is where demand of payment is made over the counter of the paying banker. There payment by the banker is complete as soon as he has laid down the money on the bank counter with the intention that the person to receive payment shall take it up.

The next case is where the payee pays the cheque into his account, but the payee's banker and the drawer's banker happen to be the same. In this case payment is sufficiently made by the appropriate book entries, but book entries made in mistake can be revoked so long as they have not been communicated to the customer who is to be debited with them.

Another case is where the collecting bank presents the cheque by an agent to the agent of the paying bank. Here payment to the agent of the collecting bank is payment to the principal, and even should the agent bank fail, the customer may charge the bank with the receipt of the money. The mode of payment through the clearing-house system has already been indicated in the accounts given of the working of those institutions.

Crossed Cheques.—So far we have assumed that the cheques under our consideration have been open cheques, and we may define an open cheque as one issued by the drawer without the expression of any restriction on the future treatment of the cheque by the payee or subsequent holders of it, and continuing to circulate in that condition. The various devices by which the drawer of a cheque, or some subsequent holder, may seek to control or restrict dealings with it after it has left his hands consist of directions written transversely across the face of the cheque, and known as "crossings." "The custom of crossing cheques arose long before they began to be drawn to order. Prior to 1853 it had long been usual for bankers' clerks, presenting cheques through the clearing, to stamp the names of their banks across the cheques as an indication of the channel through which they were presented. And as cheques were payable to bearer, the public themselves, as a sort

of safeguard, adopted the practice of crossing the cheque with the name of the banker to whom they wished the payment to be made. When the drawer of the cheque desired the safeguard of having the cheque paid to some banker, but did not know who was the payee's or bearer's banker, or whether he had a banker at all, it became usual to cross the cheque with two lines and the words 'and Company' between them, to indicate that it was to be paid to some banker or another."[1] When the Courts came to consider the effect of such crossings, they treated them, not as integral parts of the cheque itself, but as mere memoranda, which a holder could alter, and possibly disregard altogether. Acts dealing with crossed cheques were passed in 1856 and 1858, and again in 1876. The latter Act, with one modification, was incorporated with the Bills of Exchange Act, 1882, and appears as secs. 76 to 82 of that Act. In 1906 a short Act interpretative of sec. 82 was passed.

The general object of this legislation is to give effect to certain well-defined crossings, with the object of making a cheque a safer method of transmitting money, without at the same time unduly hampering bankers in their dealings with them. The general effect of a crossing is to make the cheque payable only through a banker. If, therefore, a cheque is stolen, the thief cannot cash it across the counter, but must pass it on to some one who will pass it through his banking account, a provision which certainly puts difficulties in the way of dishonest persons. Further, a cheque crossed "not negotiable," though it can still pass from hand to hand by indorsement and delivery, or by mere delivery, no longer confers upon a *bonâ fide* holder for value who takes without notice a good title free from previous

[1] Loyd, p. 115.

defects. Therefore, no one can prudently take a cheque so crossed without knowing its previous history, and in practice cheques crossed "not negotiable" will be handed by the payee to his banker. As "crossings" depend for their effect on statute, it will be simplest to give the purport of the sections of the Bills of Exchange Act which deal with crossed cheques.

Secs. 76 to 82 provide as follows:

There are two sorts of crossing, general and special, both of which are material parts of the cheque (sec. 78). Except as mentioned below, the alteration of a crossing is a material alteration, making the cheque void. A cheque is crossed generally when two parallel transverse lines are drawn across it, either with or without the words "and Company" between such lines, and either with or without the words "not negotiable." A cheque is crossed specially when it bears the name of a banker across its face, with or without the words "not negotiable" (sec. 76).

An uncrossed cheque may be crossed generally or specially by the drawer or the holder (sec. 77).

A cheque crossed generally may be crossed specially by the holder. The holder may, in any case, add the words "not negotiable" (sec. 77).

When a cheque is once crossed specially, such crossing becomes a material part of the cheque, and must not be altered or added to, except that the banker to whom it is crossed may again cross it specially to another banker for collection (secs. 77 and 78).

Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself. This is a safeguard against the dishonesty of the banker's own servants (sec. 77).

If a cheque is crossed specially more than once,

the banker on whom it is drawn must refuse payment of it unless the second crossing is made by a banker to another banker as his agent for collection. Where the banker on whom a cheque is drawn, which is crossed more than once, wrongfully pays it, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (sec. 79).

The banker is liable to the true owner of a cheque in case of loss if he pays a cheque crossed generally to anyone but a banker, or a cheque crossed specially to any banker but the one to whom it is crossed, or to another banker as his agent for collection (sec. 79).

This liability to the "true owner" should be noted. As has already been explained, the paying banker is, in general, only liable to his customer.

There is a proviso in the Act that if the crossing has been obliterated, and there is no apparent crossing or apparent alteratien, the banker paying the cheque in good faith and without negligence is not to be responsible (sec. 79).

A banker paying in good faith and without negligence a crossed cheque in the proper manner is in the same position as if payment of the cheque had been made to the true owner of it; and so also is the drawer of the cheque, provided that the cheque has come into the hands of the payee (sec. 80).

The effect of crossing a cheque as "not negotiable" is to render a person who afterwards takes the cheque incapable of having or giving a better title to the cheque than the person from whom he took it (sec. 81).

A collecting banker who receives payment in good faith, and without negligence, on behalf of his customer, of a cheque crossed generally or specially to himself, to which cheque the customer has no title or a defective

title, does not incur any liability to the true owner of the cheque by reason only of having received such payment (sec. 82). By the Bills of Exchange (Crossed Cheque) Act, 1906, it is enacted that a banker receives payment of a crossed cheque for a customer within the meaning of sec. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. As we have already seen, a banker who credits a customer with a cheque before it is paid becomes a holder for value of the cheque. The House of Lords held that a banker could not be a holder for value and an agent for collection at the same time. The effect of this new Act is to give the banker the protection afforded by sec. 82, even when he is a holder for value of the cheque.

Some crossings not mentioned in the Act are in fairly common use, such as "a/c payee," or "for account of A. B." These are apparently used under the impression that the *paying* banker must observe them, and must in some way see that the proceeds of a cheque so crossed are carried to the account specified, as well as paid either to a banker or to the banker specially named. This liability is not recognized by bankers, and the machinery of the clearing-house is all against any such recognition.

CHAPTER IX

BILLS OF EXCHANGE

Negotiable instruments—Description of a bill—Trade bills and their advantages—Short bills—Accommodation bills—Foreign bills—Some legal characteristics of bills—"Holder" of a bill—Dishonour of a bill—Banker as payer of bills—Forgery—Banker as collector of bills—Documentary bills.

Negotiable Instruments.—We have already considered very simply the history of bank-notes and cheques, and have characterized them as "negotiable instruments." They are both simplifications of a much older negotiable instrument known from quite early times to the whole trading community of Europe—viz., a bill of exchange. The English law on bills of exchange owes its origin, not to the common law, but to what is known as the Law Merchant; and, in fact, English Judges at one time showed a disposition to regard the law merchant as an interloper, and to favour the common law, which knows nothing of negotiability, at the expense of the law merchant, on principles which, had they not been overruled in the House of Lords some thirty years ago, might have laid unnecessary restrictions on the development of many convenient commercial instruments, including bearer debentures. By the common law (with certain

exceptions) a person cannot give a better title than he himself has, so that a person who buys from a thief cannot get a good title to the thing that has been stolen, although the purchaser may be buying in perfect good faith. We have already seen that notes and cheques are exceptions, and this is because they are negotiable instruments. Again, by the common law a debt, or the benefit of a contract, is not assignable. Thus, if A owed B £100, payable in three months' time, at common law B could not sell the debt to C without A's concurrence. In equity this could be done, but C must give notice to A, and if A had any claim against B, he could enforce it against C, or, in other words, C "took subject to equities." Now, the debt expressed to be payable by the terms of a negotiable instrument is transferable by the law merchant in the simplest possible manner—namely, by indorsement and delivery of the instrument itself (or in "bearer" instruments by mere delivery)—so that the person taking the instrument *bonâ fide* and for value gets a good title, irrespective of previous defects of title, and takes it free from any equities which could be enforced against the original or any intermediate holder.

Description of a Bill.—There are several different forms of negotiable instruments, of which some of the most important are quite modern, and have come into vogue since the growth of trading companies; but our concern is with bills of exchange. A bill of exchange was originally a means by which a trader in one country paid a debt in another country without the transmission of coin. If A in London owed money to C in Paris, but himself was owed an equal sum of money by B in Paris, A would order B to pay C, the two debts would be cancelled, and the same effect would have been pro-

duced as if A had sent money to C, and B had sent money to A. A's written order to B, sent to C and acceded to by B, was the first form of a bill of exchange. A is the drawer, B the drawee—who, upon consenting to the arrangement, becomes the acceptor—and C is the payee. It was at one time of the essence of a bill that the drawer and acceptor should be traders in different countries; later, it was sufficient if they lived in different towns; now, by English law, it does not matter where the parties live, nor need bills be trade documents.

The following is a specimen bill of exchange of the simplest type:

Stamp, 2*s.*

£200 BIRMINGHAM,
July 25, 1907.

Three months after date pay to Henry Smith or order the sum of Two hundred pounds.

WILLIAM JONES.

To R. HILL, Esq.,
17, King Street, London, E.C.

Here William Jones is the "drawer," Henry Smith is the "payee," and R. Hill is the "drawee," who, on testifying his willingness to pay, called "accepting" the bill, becomes "acceptor."

Trade Bills and their Advantages.—We will suppose that William Jones is a manufacturer, and that he owes Henry Smith £200 for raw material supplied, while R. Hill is a shopkeeper who has bought manufactured articles from William Jones, and owes him more than that amount. In this case the bill is a trade bill, and its commercial advantages are already obvious, for the payment by R. Hill to Henry Smith will discharge two separate trade debts. But there are other advantages not quite so obvious. Henry Smith may want money

at once for further trade purposes, and if he does, he can take the bill at once to his bankers (or elsewhere) and ask them to discount it for him. If they know William Jones as a man of good credit, they will be prepared to discount it even before R. Hill has accepted it. Henry Smith must sign his name on the back of the bill, with or without a further order to pay the bill to the bankers. Henry Smith then becomes indorser, and the bankers, on crediting Henry Smith's account with £200, less discount as agreed, become holders for value of the bill; and if neither R. Hill nor William Jones should pay the bill at maturity, then Henry Smith, as indorser, would be liable to pay it. The bankers can either keep the bill and present it for acceptance and payment, or can pass it on to some other person. When a bill of exchange has gone the round of several holders, each of whom has taken the bill by indorsement from a previous holder, there may be quite a number of persons liable on it; but the law merchant, and now the Bills of Exchange Act, 1882, has settled the order of their liability. In the case of an ordinary trade bill, "prior to acceptance, the drawer is the principal debtor, and indorsers are sureties for him. On acceptance, the drawee takes upon himself the principal liability, and the drawer and indorsers are sureties for the acceptors; but they are not in a position in which ordinary sureties are, where several are sureties for one person—that is to say, while they are all co-sureties towards the holder, who may proceed against any or all on default of the principal debtor, they are not co-sureties towards each other, and entitled, as such, to contribution from each other all round. As regards each other, the most rigid punctilio and order of sequence prevails. As between themselves, each prior

party is a principal, and those who come after him are sureties."[1]

Then there is this advantage also: Henry Smith may not care to press his customer, William Jones, too closely for money, nor may William Jones care to press his customer, R. Hill. But William Jones, by drawing on R. Hill in favour of Henry Smith, makes either Henry Smith or Henry Smith's bankers demand payment of R. Hill, and between these parties there is no trade relationship to be endangered.

Short Bills.—If Henry Smith retains the bill until it is about time to be "collected," and hands it to his bankers for collection, it is then called a "short" bill, and it is said to be entered "short," when it is treated in the banker's books as a bill and not as cash. A century ago it was said that it was the practice of bankers in London, upon the receipt of undue bills from a customer, not to carry the amount directly to his credit, but to enter them short, as it is called—that is, note down the receipt of the bills in his account, and the amount, and the times when due, in a previous column of the same page, which sums, when received, are carried forward into the usual cash column. In the case of a collected bill, the customer is, of course, credited with the full nominal value of the bill.

Accommodation Bills.—But all bills are not genuine trade bills, as bills are often drawn as a convenient mode of accommodating a friend. Thus, Henry Smith may be in want of money, and goes to his friends, William Jones and R. Hill, who, instead of lending the money directly, propose to draw an "accommodation" bill in his favour. Henry Smith promises to reimburse R. Hill before the three months is up. If the credit of Jones and Hill is

[1] Loyd, p. 38.

good, this device enables Smith to get an advance (in the illustration given above) of £200 from his bankers at the commercial rate of discount.

The real debtor in this case is not R. Hill, the acceptor, but Smith, the payee, who has engaged to find the money for its ultimate payment, and Smith is here the principal debtor and the others merely sureties. This inversion of liability affords a convenient definition of an accommodation bill. "If, as between the original parties to the bill, that one who would *prima facie* be principal is, in fact, the surety, whether he be drawer, acceptor, or indorser, that bill is an accommodation bill."[1]

Foreign Bills.—In the case of foreign bills, even more complicated trade payments may be carried through by the operation of a single bill. The following diagram[2] will illustrate this:

Rio.	London.
A−	B+
(unpaid exporter to B).	(importer on credit from A).
C+	D−
(importer on credit from E).	(unpaid exporter to G).
Lisbon.	**Paris.**
E−	−G+
(creditor of C).	(creditor of F and debtor to D).
F+	
(debtor of G).	

Here we may imagine that A draws a bill in duplicate upon his debtor, B, of London, and sends the first of the set forward for acceptance. The second, with a notice on it of where the accepted part will be found, he indorses to C, subject to discount. By so doing, A has received what he expected to get from B. C can

[1] Loyd, p. 27.

[2] Adapted from Loyd.

pay for the bill what he owes to E, and can then endorse the bill and send it on to E, who takes it in payment of C's debt. E wants to turn the bill into cash, and sells it to F. F has paid for it what he owes G, so he indorses it, and sends it on to G, who receives it in payment of F's debt, and, being himself in debt to D, sends it off to D, who either discounts it with his bankers, or himself presents it to B on the due date for payment, and gets paid by B. The reader may ask, How does A know that C wants a bill, or E know that F wants a bill? As a matter of fact, A will not know this, nor will E, but there will be a great many persons in A's position, and a great many in C's position, and this fact has brought into being bill-brokers, whose business it will be to buy of the A's and sell to the C's. As the bill-brokers, after all, are only middle-men, we may, for simplicity's sake, imagine that A and C and E and F have direct dealings.

Some Legal Characteristics of Bills.—The law as to bills of exchange is so elaborate that the Bills of Exchange Act, 1882, which consolidates the law on the subject, contains over ninety sections. It would be quite beyond the scope of this work to give even a short summary of its contents, but it will be well to notice a few of the chief legal characteristics of bills. The Act defines a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer."

For bills not payable on demand three days of grace are allowed. A bill is payable on demand which is expressed to be so payable on demand, or at sight, or on presentation, or in which no time for payment is ex-

pressed. The sum payable is a sum certain, although the bill makes provision for the payment of interest, or payment in instalments, or contains a provision that, upon default in payment of any instalment, the whole shall become due, or, in the case of a foreign bill, provides for payment according to a particular rate of exchange.

The difference between a bill payable to order and a bill payable to bearer is the same as between an order cheque and a bearer cheque.

A person becomes the holder of a bill payable to bearer by delivery of the bill, and of a bill payable to order by indorsement of the holder followed by delivery. The transferor of a bill payable to bearer is not liable on the instrument, but he warrants to his immediate transferee for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. The indorser of a bill, by indorsing it, engages that, on due presentment, it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken. We have used two terms of which some further explanation may be given —viz., "holder" and "dishonour."

"*Holder*" *of a Bill.*—The word "holder" is used in regard to bills in three grades of meaning—"holder," "holder for value," "holder in due course." We have seen that the two main characteristics of a negotiable instrument, and therefore of bills, are (*a*) the simple mode in which a person may become a transferee of the bill, and (*b*) the fact that a person who gives value for the bill, and takes it without notice that there is anything

wrong about its past history, holds it free from previous defects in title. Now, holder means a person in whose legal possession the bill is. Holder for value is one who has given value for the bill. Holder in due course is one who has given value, and given it honestly. On ordinary occasions it is enough to be the holder of a bill. Thus, suppose M is the holder of a bill which has been transferred from A to B, B to C, and so on, and which X by acceptance has promised to pay. If, when M presents the bill to X for payment, X says, "Who are you?" "Why should I pay you?" or, "I accepted the bill at A's request, and I did owe him the money, but he now owes me £5, which I want to deduct," M need only reply, "I am the holder, and have nothing to do with the state of the accounts between you and A." X must pay, and M need not prove that he gave value, or gave it honestly. If, however, X proves that L, from whom M got the bill, did not give value for it, and says that L ought to be demanding payment, and not M, and that he has a cross-claim against L, then M has to prove himself a holder for value, and on M proving that he paid L for the bill, X must pay M. These claims by X to assert his rights against A or against L when sued by M were claims which would have been recognized in equity if the debt had been assigned under the rules laid down by equity when it mitigated the rule of the common law against the assignment of debts. The right of M to be paid without regard to these claims of X is what is meant when we say that M holds "free from equities." But suppose that X proves that L stole the bill, then M must show that he is a holder in due course—*i.e.*, that he both gave value, and gave it honestly, not knowing that anything was wrong. On M proving himself holder in due course X must pay M. An ordinary

business man taking a current bill for value, without notice of any fraud or other defect in its title, is a holder in due course.

Dishonour of a Bill.—A bill is dishonoured either by non-acceptance or non-payment. An acceptance is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill, and be signed by the drawee. The mere signature of the drawee is sufficient. If the acceptance is refused, or only a qualified acceptance is proferred and not taken, the bill is dishonoured by non-acceptance. The drawee is allowed time to consider whether he will accept or not. The customary time within which to accept is twenty-four hours from presentment, exclusive of non-business days. If the requisite proceedings for dishonour are not taken, the holder will lose his right of recourse against the drawer and indorsers. On dishonour such right of recourse immediately accrues, and no presentment for payment is necessary. In certain cases presentment for acceptance is not necessary, and presentment for payment suffices, but "it is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay, for, in case of acceptance, the holder obtains the additional security of the acceptor, and, if acceptance be refused, the antecedent parties become liable immediately. It is advisable, too, on account of the drawer, for, by receiving early advice of dishonour, he may be better able to get his effects out of the drawee's hands."[1] As a general rule, a bill must be presented for payment, otherwise the drawer and indorsers will be discharged. It must be presented on the day it falls due at a reasonable business hour. If payment is refused or cannot be obtained, the bill is dishonoured

[1] "Byles, On Bills," sixteenth edition, p. 211.

by non-payment, and a right of recourse against the drawer and indorsers accrues to the holder.

When a bill has been dishonoured either by non-acceptance or non-payment, as a general rule notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged. Notice of dishonour, where the persons to give and receive it reside in the same place, must be sent off in time to be received on the day after the dishonour of the bill, otherwise it must be sent off not later than the day after the dishonour of the bill, if there is a post at a convenient hour on that day, and if there is no such post, then not later than by the next post thereafter. Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after dishonour. The notice may be, but need not be, in writing. It must identify the bill and intimate that it has been dishonoured by non-acceptance or non-payment. The return of a dishonoured bill is a sufficiently formal notice.

In the case of the dishonour of a foreign bill, appearing on the face of it to be such, it must be "protested," otherwise the drawers and indorsers will be discharged. The object of protest is to have an independent account of events taking place at one place which affect the rights of parties at other places which may possibly be at a great distance. The person called in is known as a "notary public." He sends his clerk down to verify the fact of dishonour on the day of dishonour, and "notes" on the bill the date and reason for dishonour. The bill has then been "noted." This is an incipient protest, as the protest can be drawn up

afterwards, and need not be prepared at once. A protest must contain a copy of the bill, must be signed by the notary making it, and must specify the person at whose request the bill is protested, the place and date of protest, the cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. The expense of noting and protest can be added to the claim of the holder of the bill against the parties liable on it.

Banker as Payer of Bills.—A business man who has bills to pay or receive will usually do both operations through his banker. A banker is not bound to pay the bills which a customer accepts payable at his banker's, but the acceptance of a bill by a customer payable at his banker's is an authority to the banker to pay the bill, even though there are not sufficient funds of the customer's in his hands. In practice, if the banker has sufficient funds of his customer, he will, as a matter of course, act on the authority.

Forgery.—The effect of forgery is more complicated in the case of a bill than a cheque, and there is no statutory protection to bankers paying on forged indorsements. On the one hand, the drawee of a bill is bound to know the drawer's signature, and it is his fault if he writes his acceptance on a forged instrument, and it is his act of acceptance which sends the bill forward for payment to the banker. On the other hand, the banker has to take the risk of paying to a person who claims through a forged indorsement. The law as to material alterations is the same for bills as cheques.

Banker as Collector of Bills.—When a banker receives bills for his customer, he may purchase them or merely collect them. Where the banker receives the bills

merely for collection, even when indorsed to him, they do not become his absolute property, and on the bankruptcy of the banker, the customer may recover such as remain in specie in his hands. The fact that the customer expects, and is allowed, to draw against the bills whilst still remaining undue does not make them the property of the banker, although the banker may have a lien to the extent of his advances.

Documentary Bills.—The use of bills in foreign trade is very usually combined with a pledge of the documents of title to the goods for the price of which the bills are drawn, such pledge being made to secure the due payment of the bills at maturity. The main document of title is the bill of lading of the goods.

A bill of lading is the document signed by the master of a ship upon the shipment of goods for carriage, acknowledging the receipt of the goods on board, and undertaking to deliver them to the consignee, "or to his order or assigns," upon payment of the freight therein stipulated for. By the custom of merchants, a bill of lading is taken to represent the goods shipped, and the indorsement and delivery of the bill of lading by the shipper or owner of the goods transfers the property to the indorsee, and subsequent transfers by the indorsee of the bill of lading are equivalent to a transfer of the property in the goods.

Where goods are being shipped from abroad, the bills of lading can be sent with the bills of exchange drawn for the price, and the banker who is asked by the English purchaser of the goods to accept the bills of exchange can hold the bills of lading as security for the repayment to him by the customer of the amounts paid on the bills of exchange. To facilitate these operations, bankers sometimes give their customers what are known as

documentary letters of credit, under which the bankers promise to accept bills up to a limit indicated in the letter of credit, conditionally on the remittance of bills of lading with invoices and insurance policies attached.

The object and nature of a documentary letter of credit have been thus stated: "A, a merchant in Liverpool, wants to buy some cotton in Pernambuco. In the ordinary course of things he would write out to persons at Pernambuco, and request them to buy the cotton, and draw bills on himself for the price. But the parties may wish to take a different course. A may be a most respectable and solvent person, but, at the same time, it is thought desirable that there should be some name brought into the transaction for the purpose of using it in the Pernambuco market—some name perfectly well known there, whose credit is such that every person would accept it, provided only you can assure the merchant to whom you want to offer the bills drawn on that person that the bills will be accepted when they get home. How is that to be accomplished? There is a bank at Liverpool which has a great reputation, B's bank, and A knows that if he can get a letter from B's bank saying that these bankers will accept the bills when they come home, he can send that letter to his correspondents at Pernambuco, and they will be able to show it to any merchant to whom they might offer the bills to pay for the cotton, and the letter of credit so shown will be a certificate that the bills will be accepted when they come home, and so the bills will pass as current as if they were accepted bills. The letter of credit must contain, besides the promise to accept, for the protection of the bankers, orders to those who are dealing with the cotton as to how they are to send home the shipping documents relating to the cotton.

These orders are distinct from the promise, and are not for the protection of the bill-holders."

When a banker is asked by his customer to accept a documentary bill, he does not take upon himself the risk of the bill of lading being a genuine document, and need only see that it is regular on the face of it. If the bill of lading turns out to be forged, the banker, having paid the bill of exchange, can recover the amount from his customer.

CHAPTER X

NEGOTIABLE INSTRUMENTS AND TRANSFERABLE DOCUMENTS OF TITLE

Negotiability of money securities—Foreign negotiable instruments—English negotiable instruments—Title by estoppel—Title under bill of lading—Title by apparent owner.

Negotiability of Money Securities.—We have been dealing with some of the oldest and simplest negotiable instruments—namely, notes, cheques, and bills of exchange—and have explained what the meaning of negotiability is. A negotiable instrument may be defined as a written instrument the benefit of which will, by the law merchant, pass by indorsement and delivery, or by mere delivery, so that a person taking the instrument *bonâ fide* and for value gets a good title, irrespective of previous defects of title, can sue on it in his own name, and takes it free from any equities which could be enforced against the original holder. We may further say that *the benefit contemplated by the instrument is, in general, the payment of money*, either by a Government, as in the case of Government bonds and scrip; or by a company, as in the case of debentures; or by an individual, as in the case of bills and cheques. The exceptions to this rule are foreign share certificates and English share warrants; but even the exception is more apparent than

real, because a share in a company is, in essence, the right to a share of the net moneys produced by the final realization of the assets. Equity on this principle regards land held by a partnership as in essence money, because at the end of the partnership it will be sold and distributed as money amongst the partners. Instruments, such as bills of lading which promise the delivery of goods, though they may be transferable by indorsement and delivery, are not negotiable instruments in the full sense of the term, as the transferee does not get a better title than his transferor has.

Foreign Negotiable Instruments.—In the case of foreign instruments, such as Government bonds and scrip, debentures, and share certificates, containing words making them transferable by delivery, either with or without indorsement, the English Courts treat such instruments as negotiable, subject only to proof in each particular case that the instrument in question is by custom dealt with in England as a negotiable instrument. The earliest example[1] of a foreign instrument being held to be negotiable was the case of the King of Prussia's bonds, in which he declared himself and his successors bound to every person who should for the time being be the holders of the bonds for the payment of the principal and interest in a certain manner. It was proved that such bonds were negotiated like Exchequer bills, which are well-known English negotiable instruments. The custom to treat a foreign instrument as negotiable must be an English custom, and the custom of the country of its issue is not sufficient.

English Negotiable Instruments.—At one time the English Courts drew a distinction between foreign and English instruments purporting to be negotiable, but

[1] *Georgier* v. *Mieville*, 3 B. and C., 45.

the ground of this distinction was cut away by a decision[1] of the House of Lords in 1876. Since 1898 two important decisions have been given as to the negotiability of bearer debentures, which are now perhaps the best known and most used of modern negotiable instruments. In the latter of these decisions[2] the Court went so far as to say that it was not now necessary to tender evidence to prove that bonds of the kind in question were negotiable instruments, that being a fact of which the Court will take judicial notice.

It will be worth while to consider the nature of these bearer debentures a little more closely. A debenture is the technical name for an acknowledgment of indebtedness made by an incorporated company; it generally contains a charge on the company's property.

The material clauses in these bearer debentures contain provisions to the following effect: (1) A promise to pay the principal when due to the bearer; (2) a notice that the principal moneys and interest will be paid without regard to any equities between the company and the original or any intermediate holder; (3) a provision that the issuing company shall not be bound to inquire into the bearer's title; and (4) an express intimation that until the bearer registers himself as holder the debenture is to be regarded as negotiable, and all persons are invited by the issuing company and the owner for the time being to act accordingly.

Share warrants to bearer issued under the Companies Act, 1867, and scrip certificates for shares issued by English companies, have both been held to be instruments which may be negotiable by mercantile usage.

[1] *Goodwin* v. *Robarts*, 1876, A.C., 476.

[2] *Edelstein* v. *Schuler and Co.*, 1902, 2 K.B., 144.

Title by Estoppel.—So long as the view of the Courts was that as regards English instruments purporting to be negotiable "the law merchant was fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce," the only way in which negotiability could be established in the use of a new English instrument was for the parties to a particular transaction to be precluded or estopped from denying that the particular instrument in question was negotiable. A person might issue an instrument drawn in such terms, or deal with an instrument so issued in such a way that he thereby represented that so far as he was concerned his rights arising upon that particular document should be regulated on the footing that the instrument had one or all the qualities of negotiability. A person who made such a representation would be precluded or estopped, when that representation had been acted on by another, from afterwards turning round and setting up claims inconsistent with his former conduct. When such an instrument was sued upon, the Courts in effect said: This is an English instrument, and we do not like to decide that it is a new kind of negotiable instrument; but we can say, and do say, that the parties to this action have dealt with it as a negotiable instrument, and we cannot allow them now to turn round and say it is not a negotiable instrument. Such an instrument was with some inaccuracy spoken of as negotiable by estoppel. It is not now necessary to rely on estoppel as regards securities for the payment of money of the nature already described; but negotiability is so convenient in commerce that instruments which confer a title to goods are often drawn in a form analogous to

negotiable money securities. A person who has issued a document of title to goods so drawn is then precluded from dealing with the goods except in accordance with the terms which he has himself laid down. The decision of the Courts as to these instruments was first given in a case[1] dealing with warrants for the delivery of iron; or, more shortly, iron warrants. The Merchant Banking Co. had taken iron warrants originally issued by the Phœnix Bessemer Steel Co. to Smith and Co., to cover acceptances on behalf of a customer. The warrants were to the effect that so much iron was held by Bessemer, "deliverable, free on board, to Smith & Co., or their assigns, by indorsement hereon." By the usage of the iron trade, such warrants are considered to pass to holders for value, free from any vendor's lien. The Merchant Co. sought to enforce delivery of the iron without payment of the purchase-money, which the original purchasers, Smith and Co., had never paid. It was held that the company could do so; and Jessel, M.R., said: "The form was invented about 1846, and the practice grew general about 1866, and I think from that time till now we must consider it, on the evidence, as an established custom that *any man who gives this warrant understands that it shall pass from hand to hand for value by indorsement, and that the indorsee is to have the goods free from any vendor's claim for purchase-money.* He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape, he tells all the trade that they may safely deal on the faith of that warrant, and whether or not it becomes a negotiable instrument at common law, as distinct from equity, is, to my mind,

[1] *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 5 Ch.D., 205.

utterly immaterial. That is the custom, and as the man who issues such a warrant knows that custom, it appears to me that the Phœnix Bessemer Co. have issued these exactly as if they had said they were to be deliverable according to the custom of the iron trade—that is, to be deliverable 'free from any vendor's lien,' to Messrs. Smith and Co., or their assigns, by indorsement. If these words had been inserted, as I think it will be desirable in future they should be inserted, can anybody doubt that the company, by issuing the warrant in that form, would be precluded in equity from afterwards alleging that they were unpaid vendors."

The Courts have never yet had to consider what would be the effect of a theft of iron or other warrants, and whether the true owner could claim the goods from a subsequent *bonâ fide* holder of the warrants who had obtained delivery. As a matter of practice such cases are not likely to occur very often, because a fraudulent clerk or other person has not the same means of taking delivery of goods as he has of getting payment of money. What the mercantile world wants is a document of title to goods which the issuer is bound to treat as transferable by endorsement, and free from any equities that he can set up; and, under the doctrine of estoppel or preclusion, these "warrants" answer this purpose.

Title under Bill of Lading.—We have already seen at the end of the last chapter what a bill of lading is. A bill of lading is not negotiable in the sense that the transfer of it to a *bonâ fide* holder for value can pass to such transferee a better title to the property represented by it than the transferor himself had. The bill of lading only represents the goods, and the transfer of a bill of lading only gives

a title to the goods when an actual transfer of the goods under the same circumstances would give a title. The rule of the common law is that, except by a sale in market overt,[1] no one can give a better title to goods than he himself possesses. It has been accordingly laid down[2] that, although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods. And the same principles apply in the case of subsequent owners who have been wrongfully deprived of the bill of lading.

Title by Apparent Owner.—We have already seen that a factor is an agent entrusted with goods for the purpose of selling them for his principal. Very often he has not the actual goods in his possession, as they may be on board ship, or at a dock warehouse, or elsewhere, but he holds the documents of title to the goods. A general agent, as has been said, while acting within the limits of his apparent authority, can confer a good title upon a *bonâ fide* purchaser without notice, even if he is acting contrary to private instructions given by his principal. A purchaser, therefore, could always deal safely with a factor whom he found in possession of goods or the documents of title to them. This was at one time all that was necessary for trade purposes. Later it became a usual and accustomed course for factors entrusted with goods

[1] Market overt (ouvert) is the old legal term for open market. When the trade of the country was largely carried on in markets and fairs special privileges were attached to transactions which took place in them.

[2] *Gurney* v. *Behrends*, 3 E. and B., 622.

for sale to make advances to their principals, either in money or by the acceptance of bills of exchange, against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money-dealers. The courts of law, however, continued to hold that a pledge was out of the scope of an authority to sell, and that, therefore, a pledge by a factor, not being an act within the limits of his ostensible authority, did not bind his principal.

Various Acts to remedy the difference between law and mercantile usage have been passed, and the Act now in force is the Factors Act, 1889. The Act contains wide definitions of the terms "mercantile agent" and "documents of title" as follows:

A mercantile agent means one who has, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Documents of title include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

The first case of the disposition of goods with which the Act deals is the disposition of them by a mercantile agent who is, with the consent of the owner (which consent is presumed in the absence of evidence to the contrary), in possession of goods or documents of title to goods. Any sale, pledge, or other disposition of the goods by such agent, in the ordinary course of his business, is as valid

as if the agent had express authority to make the same, provided that the person taking under the disposition acts in good faith, and has no notice at the time of the disposition of an actual absence of authority in the agent to make the disposition.

The second case dealt with is where the agent has been in possession with the consent of the owner, and the consent has been determined. Any disposition by such agent, which would have been valid if the consent had continued, is still to be valid, provided that the person taking under the disposition has no notice of such determination at the time when he takes under the disposition.

On the same principle, where a seller has been allowed to continue in possession of goods sold or of documents of title thereto, or a purchaser has obtained possession of goods or of documents of title thereto before payment of the purchase-money, their dealings with the goods are made valid in favour of persons dealing with them in good faith. Two sections of the Sale of Goods Act, 1893—namely, sec. 25 and 47—cover practically the same ground as these last-mentioned sections of the Factors Act, 1889.

Sec. 25 of the Sale of Goods Act runs as follows:

"(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

"(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

"(3) In this section the term 'mercantile agent' has the same meaning as in the Factors Act."

Sec. 47 of the Sale of Goods Act enacts as follows:

"Subject to the provisions of this Act, the unpaid seller's right of lien, or retention, or stoppage *in transitu*[1] is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto: Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

[1] On the insolvency of the buyer the unpaid seller has a right to recall any goods which are in course of transit to the buyer. Such goods are "stopped *in transitu*."

CHAPTER XI

LAW OF CONTRACT—OFFER AND ACCEPTANCE

Contract defined—Offer how made—Offer to undefined class—How long offer remains open—Revocation of offer—Communication of revocation—Exceptional case—Effect of counter-proposition—Acceptance—Who can accept—Modes of acceptance—Contracts through the Post Office.

Contract defined.—Contract in the phrase "law of contract" is used in a technical sense. To understand its real meaning we must put out of our minds all notions of contracts and contractors which we have acquired from the popular use of those words.

The essence of a legal contract is that there shall be an agreement between two persons that one of them shall do something either for the benefit of the other or for his own detriment, and that these persons intend that the agreement shall be enforceable at law. In commercial transactions we may always assume that the intention to create legal relationships is present. Two persons at least are necessary for making a contract—one the person who is bound to do the act which is the subject-matter of the contract, and the other the person to whom he is bound. The former is called the promisor, and the latter the promisee. Each such person is called a party to the

contract. In most commercial contracts each party is both a promisor and promisee. Thus, if A promises to deliver B a ton of sugar in a week's time for £10 payable in a month, A is promisor as to the delivery, and B is promisor as to payment, while B is promisee of the delivery of the sugar, and A is promisee as regards the money to be paid. There are also two stages in the making of a contract. There must be an offer on the one side, and an acceptance on the other side.

Offer how made.—Let us now examine some of the chief legal rules as to offer. *An offer is made by its terms being made known to a person who may accept it.* As soon as this is done, and not before, the offer is made to such person. A confectioner puts a notice on a plate of buns in his window to the effect that their price is 1d. each. There are passers-by, but the shutters of the shop window are closed. The confectioner has made no offer. As soon as he takes down his shutters, he makes an offer of a bun for a penny to every passer-by who reads the notice.

A murder had been committed and a reward was offered for the apprehension of the murderer. Some one who had not seen or heard of the notice offering the reward apprehended the murderer, and when he afterwards heard of the reward claimed it. It was held that he was not entitled to it, as there had been no offer made to him.[1] In commercial matters this principle is chiefly of importance where the terms of the contract are complex, as in contracts of carriage, and some of them are expressly brought to the notice of the person to whom the offer is made, and other terms are not. Thus,[2] a passenger from Dublin to Whitehaven who was travelling

[1] *Fitch* v. *Snedaker*, 35 N.Y. (Am.), 248.

[2] *Henderson* v. *Stevenson*, 2 H.L., 470.

with luggage paid his fare and took a ticket. He never looked at the back of the ticket, and no one told him to do so, and the front of the ticket bore no reference to the back. If he had looked at the back he would have seen a special condition exempting the steamship company from liability for the loss of the luggage. The vessel was wrecked, and the passenger lost his luggage. He claimed damages for its loss on the ground that the only offer made to him was the ordinary carrier's offer to carry him and his luggage safely for a stipulated fare. It was held that this was so, and that there was no sufficient communication of the exceptional terms contained on the back of the ticket. But where a person knows that there are special terms, but does not trouble to read them, as, for instance, in the case of a bill of lading with an elaborate schedule, or in the case of a railway consignment note, he cannot set up his ignorance as a reason for not being bound by the terms. "If the form is accepted without objection by the person to whom it is tendered, he is as a general rule bound by its contents, and his act amounts to an acceptance of the offer so made to him, whether he reads the document or otherwise informs himself of its contents or not."

Offer to undefined class.—A contract is always made with a defined person or persons, but an offer may be made to the world at large. If A makes an offer to B, B is the only person who can accept, as we shall see when we come to acceptance; but in many commercial transactions it is immaterial to whom the offer is made. Offers made by advertisement are the commonest form of offers made to the world at large.

How long offer remains open.—An offer never remains open or capable of acceptance longer than the time, if any, mentioned in the offer, or, if no time is mentioned, longer than

a reasonable time. This is a rule which is very often lost sight of in practice. Here are some examples: A seller on Thursday offered wool to a buyer, and gave him three days in which to accept. The buyer accepted on Monday, but the wool had already been sold. It was held that the offer had lapsed by Monday morning by its express terms, and the seller was not in any way bound.[1] In another case,[2] an investor applied for an allotment of shares in June, but no allotment was made till November. It was held that the offer to take shares in the company had lapsed, as a reasonable time had passed since the making of the offer, and the investor was therefore not bound to take the shares.

Revocation of Offer.—An offer may be revoked by the person who has made it at any time before it has been turned by acceptance into a contract, and this although the offer expresses the time during which it is to remain open. Thus, a bid at an auction is revocable until the hammer falls, because the bid is an offer which is acceptable by the auctioneer in that customary manner. Continuous offers to guarantee bills or supply articles at a fixed price (where there is no obligation to order any) for a fixed period, though not revocable so far as they have already been acted on, may be revoked for the unexpired portion of the original period.

Communication of Revocation.—A mental revocation of an offer must be made known to the person or persons to whom the offer was made, otherwise the revocation does not prevent acceptance. Thus, where a railway company publishes in a time-table a service of trains from A to B, with a through service beyond from B to C, and so offers to take passengers from A to C in accordance

[1] *Head* v. *Diggon*, 3 M. and R., 97.

[2] *Ramsgate Hotel Co.* v. *Montefiore*, L.R., 1 Eq., 109.

with the time-table, and the company carrying to C alters the arrangements, but the company carrying from A does not give notice of that, and issues a ticket to C, it will be held to have promised to take the passenger to C, and will be liable in damages for not doing so.[1]

Exceptional Case.—An open act inconsistent with the continuance of the offer is, in some cases, a good revocation. Some writers do not agree with this statement, even in the qualified form here given, but in the writer's opinion it is in harmony with the authorities. Thus, a refusal of some hogsheads of tobacco was given to a likely buyer until four o'clock in the afternoon. Before that time the seller sold them to a third person. The proposed buyer accepted before four o'clock, but it was held that the offer was already revoked.[2] A breach of such an undertaking appears to be a neglect of the good faith without which business cannot be well carried on, and is certain to bring its own penalties, but there seems to be no legal penalty. *The cases only cover offers to sell specific property.* Thus, an offer to sell twelve dozen of champagne of a particular brand would not be revoked by the sale of twelve dozen of the same kind of champagne to a third person, because this act would not be inconsistent with the first offer, though it would be different if the offer were to sell "the twelve dozen of champagne now in my cellar." Where the option to purchase or to have a contract kept open is of value, and time is required for consideration of its merits, such option can be legally secured by paying something for it. This is constantly done on the Stock Exchange, where money is constantly being paid for the right to buy or sell shares at a certain figure during a stated period.

[1] *Denton* v. *Great Northern Railway Co.*, 5 E. and B., 560.

[2] *Cooke* v. *Oxley*, 3 T.R., 653.

Effect of Counter-proposition.—An offer is put an end to if a counter-proposition is made to it, and the offer cannot be revived again at the will of the person to whom it was originally made. Thus, if A offers to sell B some steel rails at £5 a ton, which is a fair price, but B, thinking the market is falling, wires that he can only give £4 17s. 6d., then B has rejected A's offer, and the offer is at an end. Suppose B finds that the market is rising instead of falling, and, three hours later, wires that he will give £5 a ton, then A need not sell at that figure unless he likes, for in law this act of B's is not the acceptance of A's offer, which has come to an end, but the making of a fresh offer by B to A.

In commercial contracts there is often a long negotiation before an agreement is arrived at. In such cases it will be found that each party takes it in turn to make a fresh offer, until one of them is in a position to say "Yes" to the proposal of the other. Thus, A, a merchant in London, writes to B, a manufacturer in Bradford, ordering twenty pieces of cloth, to be delivered on or before August 20, to be paid for within three months of delivery. B replies: "I can let you have the goods by September 20." A writes that he must have them by the end of August. B replies that he must be allowed five days in September. A writes back that he is willing to allow those five days. Then, and not till then, is the contract complete. If the haggling also deals with the price and the length of credit to be given, it may require very careful thought to say when, if at all, the parties have come to a complete agreement. Each party takes it in turn to make a fresh offer, and though, on the face of the offer, perhaps only one or two points are dealt with, yet each offer incorporates the terms which have been already settled. In the instance given above, it

was settled from the first that the order should be for twenty pieces, and that there should be three months' credit given. Many questions of contract or disputed contract can be solved by inquiring when, if at all, one party said "Yes" to the offer of the other party.

Acceptance.—To turn an offer into a contract, acceptance is necessary. We may usefully ask—(*a*) Who can accept an offer? (*b*) In what way can an offer be accepted?

Who can accept.—(*a*) *An offer can only be accepted by the person to whom it has been made.* An offer of marriage is very much to the point. If a gentleman proposes for one daughter, he would be very much surprised if his offer were accepted by another daughter. Here is a commercial example:[1] A pipe-hose manufacturer sold his business to his manager without disclosing the fact to his customers, and the sale was carried through on one particular morning. On the afternoon of the same day a customer who had a running account sent an order for three lengths of 50-foot leather hose addressed to the vendor of the business by name. His ex-manager executed the order without disclosing that the business had changed hands. It was held that he could not recover the price, and it was said, "If a person intends to contract with B, A cannot give himself any right under the offer to B."

We must remember, however, that an offer may be made to the world at large, and then anyone can accept it.

Modes of Acceptance.—(*b*) *Acceptance of an offer is brought about by the person to whom the offer is made giving an unqualified assent in the mode which is expressly or tacitly pointed out by the terms of the offer.* We have

[1] *Boulton* v. *Jones*, 2 H. and N., 564.

already seen that a counter-proposition is equivalent to a rejection, and puts an end to the original offer. The unqualified assent by which acceptance is made may be shown by the acceptor doing one of three things: (1) By saying "Yes" to the person making the offer; (2) by doing some particular act, the doing of which, by the terms of the offer, is made evidence of assent; or (3) by accepting a service or benefit offered by the person making the offer. In other words, acceptance may be made by conduct as well as by the use of appropriate words.

1. *Where the acceptance is not made by conduct, the assent must be actually expressed.* The act of making up one's mind to accept is not sufficient. Two persons who discussed the sale of a horse parted, one with the idea that he had bought the horse for £30, the other with the idea that he had sold it for 30 guineas. The supposed vendor heard of the mistake, and wrote to correct it. The supposed purchaser wrote back, "I will split the difference. If I hear no more about him, I consider the horse mine at £30 15s." The vendor gave no answer to this, but in his own mind intended the buyer to have it at that price. A little later an auctioneer sold the horse by mistake with other property of the vendor. The man who thought he had bought the horse for £30 15s. claimed it, but it was held that, as his offer had never been accepted, the horse had never become his property.[1]

2. *There may be acceptance by doing some required act.* Thus, where a reward is offered for the conviction of criminals or the production of evidence, the doing of the required act turns the offer into a contract.

3. *There may be acceptance by taking a benefit.* A bus-

[1] *Felthouse* v. *Bindley*, 11 C.B.(N.S.), 869.

driver offers to carry passengers from Charing Cross to Liverpool Street for a penny. A gets into the bus, and is taken to Liverpool Street. A has taken the benefit offered, and has thereby agreed to pay the contract price of one penny for the ride.

An offer should always be accepted in the mode required by the offer, whether that mode is expressed or left to be understood. Thus, if the offer says, "Please wire reply," and the reply is sent by post, that is not a compliance with the offer, unless the person making the offer chooses to accept it as such. There is now a usage to accept commercial offers made through the post by replies sent through the post.

Contracts through the Post Office.—If the parties to a contract are at a distance from one another, it is not always easy to grasp the exact time at which an offer is made, revoked, or accepted. In these cases the Post Office generally comes into play, but before we examine what part that body fulfils we will examine the simpler case of an offer made through a messenger or servant. (1) A writes to X offering to buy his horse for £30, and sends the note by his servant B. Remembering the rule that the act of the servant is the act of the master, we see that the offer is not made when A gives the note to B, but when B delivers the note to X. (2) Suppose A changes his mind, and sends C, his groom, on horseback to overtake B. If C is in time to prevent B delivering the note, A never makes an offer to X. (3) Suppose C was too late to overtake B, but that, when B delivered the note, X said that he would consider the matter, then C may ride on and revoke A's offer, if X has not before C's arrival accepted it. (4) Suppose that B is instructed to wait for an answer, and X at once writes a reply to A accepting the offer, and gives the note to B. X has

accepted the offer, and it is then too late for A to revoke his offer by any means. (5) Again, if B drops the note on his way home, so that A never gets it, X is still bound by his acceptance, subject, of course, to proof of its contents. Now, all the special rules as to commercial contracts made through the Post Office (*i.e.*, by letter or telegram) are embraced in this one sentence, "The Post Office is the servant employed by the party making the offer to deliver the offer and receive the acceptance." From this we may deduce these rules: (1) An offer made by letter is made when the letter is delivered. (2) An offer made by letter is accepted when the letter of acceptance is posted. (3) Till the letter of acceptance is posted, but not afterwards, the offer may be revoked, as, for instance, by the delivery of another letter or a telegram. (4) The loss in the Post Office of a letter of acceptance does not put an end to the contract made by its being posted.

The following is an example from a case that went to the Court of Appeal.[1] A manufacturer at Cardiff wrote on October 1, 1879, to a merchant at New York, offering to sell 1,000 boxes of tin plates. The letter was delivered on October 11, and the merchant accepted by telegram on that day, and by letter confirming the telegram on October 15. On October 8 the Cardiff manufacturer had written to withdraw his offer, but this letter was not delivered in New York until October 20. Here the offer was made on October 11, it was accepted on the same day, and there was an attempted revocation on October 20. The dispute was whether the revocation was made on October 8 or October 20, and the decision was in favour of the later date.

[1] *Byrne* v. *Van Tienhoven*, L.R., 5 C.P.D., 344.

The only other point that need be mentioned is the application to contracts made through the Post Office of the rule that, without an express stipulation, an offer does not remain open longer than a reasonable time. It has been held that a reasonable time for an offer made in a commercial transaction through the post to remain open is the day on which the offer is received, or, if there is no mail that day, until the next mail.

CHAPTER XII

FORM AND CONSIDERATION

Necessity for consideration—Specialty and parol contracts—Contracts under seal and bonds—Essentials of consideration—Adequacy of consideration—Past consideration—Contracts that must be under seal—Contracts within the Statute of Frauds—Guarantees—Agreements for the sale of land—Agreements not to be performed within a year—Sale of goods of the value of £10—Requirements of the statute—Written contracts not within the statute.

Necessity for Consideration.—It has already been said that there is no contract unless there has been an offer by one party and an acceptance by the other party. But English law requires more than this. Either the contract must be under seal, or the party making a promise must get some return for it. This return is technically called "consideration." The rule just given may be expressed thus: A contract not under seal must be of the nature of a bargain. If we recollect that there are bad bargains as well as good bargains, and that both are bargains, we shall have a fair working conception of the English law of consideration. Example: X writes to A, offering to give him £100 next Christmas, and A writes back saying he will be very glad to accept A's offer. There is no contract, as X receives nothing in return for his

promise. If X fails to make the promised gift, A cannot successfully bring an action against him. But if X's offer was to give A £100 if A gave him an old coat, and A gave the coat, then X would in law have received a consideration, for he would have got what he bargained for, and X could be compelled to pay the £100, though the old coat might be only worth a shilling.

Specialty and Parol Contracts.—A contract under seal is known as a deed or specialty. A contract not under seal is called a parol or simple contract, and the contract is still called a parol contract, though it is in writing and not made verbally. The reason for this is historical. When writing was a rare accomplishment, any document of sufficient importance to be put into writing would be authenticated by the seals of the parties, and the natural classification was—(*a*) contracts under seal, and (*b*) verbal or parol contracts. When writing became common, many contracts would be made in writing, but not under seal. But the use of the seal was the legal criterion, and therefore these written contracts were put into class (*b*), and not class (*a*).

Contracts under Seal and Bonds.—As to contracts under seal, the distinguishing features which we need to consider are as follows:

1. If a party to a contract under seal makes statements in it, he is not allowed afterwards to dispute the truth of such statements in any action between himself and the other parties to the contract. This is called estoppel by deed.

2. A contract under seal can be sued upon for the next twenty years after its breach, whereas a simple contract can only be sued upon for six years after its breach.

3. A contract under seal is, in general, valid without a consideration.

The common commercial contract under seal is a bond. A bond is usually made to secure one of two objects—(*a*) the payment of a sum of money, when it is called a common money bond; and (*b*) the performance of some act, when it is called a bond with special conditions.

A bond expresses a promise to pay a round sum of money, and there is then added a "defeasance" or condition that the promise is not to take effect if a sum of money is paid as therein promised, or the act promised is duly performed. In equity the effect of a bond was that, on the non-fulfilment of the condition, there was payable, not the round sum of money actually promised, but either the actual sum due or the actual loss incurred by the non-performance of the act. Creditors under a bond were at one time in a favoured position, but are no longer so; but a money bond is still a convenient way of securing a fluctuating liability, such as that on an overdraft at a bank. Bonds to secure the performance of acts are generally entered into by officials as security for the due performance of their duties.

Essentials of Consideration.—A parol contract always requires a consideration. This is the reason why a promise to keep a contract open is not an enforceable contract. A makes an offer to B, and says: "I will keep this open for a week." B replies: "I should be glad if you would." Here there is an agreement between A and B for the offer to be kept open a week, but there is no contract, because A receives no consideration for his promise. As has already been pointed out, if B had said, "I will give you £5 for the option during the next week," and B had accepted this, there would be a bind-

ing contract on A's part to keep the offer open for the week.

The consideration for a promise must be either a benefit to the promisor or a detriment to the promisee or both. A promises B to go to York if B will pay him £100. The consideration for A's promise is the payment of the £100, which is a benefit to A and a detriment to B. If the contract is turned round, the consideration for B's promise is A's going to York, which might or might not be a benefit to B, but is certainly a detriment to A. A consideration for a promise may be either (*a*) a promise made in return, (*b*) the doing of an act, or (*c*) a forbearance.

(*a*) The promise to marry is the simplest illustration of a promise being the consideration for a promise. A great many commercial contracts are of this kind—*e.g.*, contracts to sell goods not yet made for credit. (*b*) The doing of an act as a consideration has been illustrated above. (*c*) We may give a more elaborate illustration of a forbearance :[1] C thought he was entitled to certain moneys from the Government of Honduras, and had threatened, and was about to take, legal proceedings against the Government to enforce payment of the moneys. B was anxious that such proceedings should not be taken for, at any rate, a certain period, and promised C some railway bonds if he would hold his hand. C carried out his undertaking, but B refused to hand over the railway bonds, and, when sued, said there was no consideration for his promise. The forbearance to sue was held to be a good consideration. "For when a person who, *bonâ fide*, believes he has a fair chance of success forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of

[1] *Callischer* v. *Bischoffsheim*, L.R., 5 Q.B., 449.

being annoyed with an action, escapes from the vexations incident to it."

Adequacy of Consideration.—A consideration need not be a full return for the promise, but it must be something to which the law attaches a value. The law, with one or two exceptions, leaves people to make their own bargains, and does not concern itself with the adequacy of a consideration. Thus,[1] a man named Brooks signed a guarantee and handed it over to Haigh. He afterwards wanted it back from Haigh, and promised to pay a sum of money for Haigh if he would return it. Haigh did return it, but Brooks afterwards discovered that the guarantee was worthless, and therefore refused to make his payment, and pleaded that there was no consideration for it. The Court held that the actual surrender of the possession of the paper on which the guarantee was written was a sufficient consideration without reference to its contents.

Past Consideration.—A past act or forbearance—that is, one which took place and is complete before the promise is made—is not a good consideration in law. Some writers divide considerations into past, present, and future; but nothing is gained by this classification, and something lost. By a future consideration is meant an act now promised, but to be performed in the future, or, in other words, a present promise. We have already seen that one promise is a good consideration for another promise. A consideration that is really past is bad in law. Thus, a warranty given after the sale of a horse is null, although a warranty given as part of the terms of sale is good. There is one exception, or what looks like an exception. Where one party renders a service to another at his request without a definite offer of

[1] *Haigh* v. *Brooks*, 10 A. and E., 309.

reward, but not merely as a gratuitous favour, and the party served afterwards promises to pay for the service, there is a good contract. For the party served would have had to pay a reasonable sum for the service, and the subsequent promise merely settles the amount to be paid. A comparison may be made with the section of the Sale of Goods Act, 1893, which enacts that where a sale has been agreed on and nothing has been said about the price or the mode of fixing it, the buyer must pay a reasonable price. A subsequent agreement between the parties as to what is reasonable would be good. But the student should note carefully that the rendering of an unsolicited service to a person is no ground for claiming a recompense from him. Sometimes services are rendered which it is impossible to refuse, but in such circumstances the acceptance of them does not imply a promise to pay for them. As a judge once put it: "One cleans another's shoes: what can the other do but put them on?" In practice this rule comes into play when one person undertakes to do one piece of work, and actually does another, and then expects to be paid what the substituted work is worth. Thus,[1] in the course of a sailing-voyage the master of a ship gave up the command, but made himself generally useful for the rest of the time. It was held that the shipowner was not bound to pay for this service.

Contracts that must be Under Seal.—We have incidentally mentioned the contracts that must be under seal, and need only collect them. They are gratuitous contracts, and the more solemn contracts of corporations. As we have seen, the trivial and everyday contracts of any corporation need not be under seal, and an incor-

[1] *Taylor* v. *Laird*, 25 L.J., Ex. 329.

porated trading company can make its commercial contracts without using its seal.

Contracts within the Statute of Frauds.—The Statute of Frauds is a name of long standing given to an Act of Parliament of the year 1678 which was passed to prevent frauds. It is a question whether it has not contributed more to injustice than justice, but that is not material for our purposes. The general idea is to require for some contracts evidence in writing, and for other contracts an act either symbolic in character, or which is in itself a part performance of the contract. But in all cases of a contract within the Statute the plaintiff cannot successfully rely on merely verbal evidence. Where the special requirement consists of evidence in writing, the Statute does not require the contract to be made in writing, but it does require the contract to be in writing when one of the parties to it seeks to sue the other on it. It is convenient to speak of the Statute, but, as a matter of fact, sec. 17 has been replaced by sec. 4 of the Sale of Goods Act, 1893. As students of commercial law, we need notice only sec. 4 of the Statute and the section of the Sale of Goods Act just referred to.

We may summarize the Statute of Frauds for our purpose as follows: No action shall be brought (*a*) to charge a person upon any special promise to answer for the debt, default, or miscarriage of another person; (*b*) upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (*c*) upon any agreement that is not to be performed within the space of one year from the making thereof, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and

signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Sec. 4 of the Sale of Goods Act, 1893, runs thus: "A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf."

We will first define somewhat more closely the classes of contracts within the Statute, and then proceed to explain further its requirements.

Guarantees.—Promise to answer for the debt, default, or miscarriage of another person. It is usual nowadays to speak of a promise to answer for the debt or default of another person as a guarantee. In a guarantee there are always three parties instead of the usual two —there are two promisors and one promisee. But the liability of the promisors is not identical. The guarantor only becomes liable upon the failure of the other promisor to carry out his promise. This is well illustrated by the judgment in an old case:[1] "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, 'Let him have the goods; I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." If the arrangement between the parties can be fairly summed up in the sentence, "If he

[1] *Birkmyr* v. *Darnell*, 1 Sm., L.C., 310.

does not pay you, I will," or the sentence, "If he does not perform his contract, I will be responsible," the contract is within the Statute; if it cannot be so summarized, the contract is not within the Statute.

Where the payment of a debt is guaranteed, the person primarily liable is usually spoken of as the principal debtor, and the guarantor is called his surety. In all cases of guarantee or suretyship, the consideration for the surety's promise should be carefully noted, as a surety, when called upon to pay, may feel that he has received no consideration for his promise. If A advances £100 to B, and X becomes surety for the repayment of that sum, A is £100 out of pocket, which he would not have been but for X's promise, and X must have some interest in B receiving that sum, or he would not have interfered to bring it about.

Agreements for the Sale of Land.—Land, in law, carries with it the buildings upon it, so that the purchaser of such necessities to business as an office or a workshop comes within this section. Most business men have at some time or other to deal with these purchases, and they will be well advised to have their bargain made in writing, and to have a solicitor's advice at an early stage.

Agreements not to be performed within a Year.—Only such contracts are included within the class of agreements not to be performed within a year as are incapable of being completely performed by either party within the year. Thus, a contract to take in a history of England in twenty-four monthly parts, to be paid for on delivery, is within this section, as neither payment nor delivery can be completed within the year. Contracts of service for a year certain from a future day are also within the section, and other instances will readily occur to the reader. In the above examples the time for complete

performance on both sides is definitely pointed out, but the Statute equally applies where it appears by the whole tenor of the agreement that it is to be performed after the year. Contracts which may be performed, and not necessarily must be performed, within the year, or the performance of which depends upon an event which may happen within a year, are not within the Statute. This is so, although, as a matter of fact, the performance is not actually completed within the year. Thus, a verbal promise to leave money by will has been sued upon successfully, although the person making the promise died after the expiration of a year from the date of the promise, because the death might have taken place within the year. Again, the performance of both parties must take place after the year. A contract for the sale of goods to be delivered in six months, and paid for in eighteen months, would not be within this section, as the vendor would perform his part of the contract within the year.

Sale of Goods of the Value of £10.—The section of the Sale of Goods Act as to the sale of goods of the value of £10 or upwards which we have already quoted largely explains itself. The only serious difficulty is the use of the word "acceptance." That word is used in the sense of an admission by the buyer that the goods have been delivered or placed within his control; it does not necessarily include an admission that he is satisfied with them. Thus, where a purchaser verbally agreed to buy by sample 20 tons of hay, which were delivered at his wharf, and he there sampled the hay and rejected it as inferior to the original sample, it was held that there was an acceptance of the hay within the terms of this section, though the purchaser did not accept its delivery as a due performance of the contract.

Requirements of the Statute.—The memorandum in writing required by the Statute may be made after the contract has been completed, but must be in existence before action is brought on the contract. In one case[1] a furniture dealer at Cheltenham called at a cabinet-maker's in London, and selected five chimney-glasses for £38 10s. 6d., payable on delivery. The sale was verbal. The chimney-glasses were delivered in a damaged condition, and were rejected. The purchaser wrote: "I beg to say the only parcel of goods selected for ready-money was the chimney-glasses, amounting to £38 10s. 6d., which goods I have never received, and have long since declined to have, for reasons made known to you at the time." The question arose as to whether the Statute had been complied with. It was held that the first part of that letter was unquestionably a note or memorandum of the bargain, as it contained a description of the articles sold, the price for which they were sold, and all the substantial parts of the contract, and that the repudiation of liability was immaterial on that question.

There is no need for formality in the documents. An invoice signed by the party to be charged may be sufficient, or an order-book of a tradesman, if it is signed by the purchaser (it is not likely to be signed by the tradesman himself). So the memorandum may consist of several writings, if they are sufficiently connected together by internal reference. Thus, a letter referring to an invoice may give the signature, while the invoice gives the list of goods sold and the price.

The writing must sufficiently indicate five things: (1) The contracting parties; (2) the terms of the promise; (3) the consideration; (4) the promise, or an acknow-

[1] *Bailey* v. *Sweeting*, 9 C.B.(N.S.), 843.

ledgment of it; and (5) the signature of the party to be charged, or his agent.

1. *Both parties must be named or sufficiently described.* No note of a bargain is complete unless it shows who are the parties to it. This requirement must not be confused with that which demands the signature of the party to be charged. Thus, a guarantee in which the names of the surety and the principal debtor were inserted, but the creditor was not named, was held not to comply with the requirements of the Statute.

2. *The writing must contain all the terms of the contract.* If parol or verbal evidence of additional terms was allowed, the real contract would not be the same as the written contract; and the real contract, not being capable of proof by writing, would not be enforced by the Court.

3. *The consideration must appear in writing.* There is an exception in the case of a guarantee. There is, further, an exceptional case where goods are sold without the mention of any price. In that case the price to be paid is a "reasonable" price.

4. *The promise or an acknowledgment of it must appear in writing.* If the parties have originally made their contract in writing, as, for example, through the post, the writing will itself contain the offer and the acceptance. If the note or memorandum is made after the contract, the writing must show an admission of a promise, as in the case of the sale of the chimney-glasses set out above.

5. *The memorandum must be signed by the party to be charged or by his agent.* The signature may be printed or stamped, or even be a mark, and need not be at the end of the document. The insertion of the name in any part of the writing in a manner to authenticate the

whole is a sufficient signing to satisfy the Statute. If only one party has signed, he only can be sued on the contract. If he is sued on the contract he cannot set up as a defence that he himself could not have brought an action.

Written Contracts which are not within the Statute.—When a contract is not within the Statute of Frauds we must distinguish between contracts which the parties intend to be wholly in writing, and those which they intend to be partly in writing and partly verbal. There is nothing to prevent a contract being made partly in one way and partly in the other. Thus, one man may offer by letter to sell another man a watch for £5. The parties may meet in the street and the acceptance be given verbally; or the purchaser may stipulate verbally for three months' credit. In the first case, we have an offer in writing and a verbal acceptance; in the second case, we have the terms partly in writing and partly verbal. In both cases the contract would be good in law.

If the parties make the whole contract in writing, then it is only fair that neither should be allowed to say, "I meant this or that to be a term, though I forgot to tell you so." The rule of law is that, where the contract is meant by the parties to be entirely in writing, they are not allowed to add to it, or to alter it by verbal evidence.

CHAPTER XIII

FLAWS IN CONTRACTS

A. Void and Voidable Contracts.

Reality of agreement—Mistake—(1) *As to nature of transaction—*(2) *In common assumption—*(3) *Through latent ambiguity—*(4) *As to the promise—Misrepresentation—Insurances—Contracts for sale of land—Contracts for allotment of shares—Contracts of guarantee—Fraud—Directors' Liability Act,* 1890.

B. Lawful and Unlawful Contracts.

Wages—Marine insurance—Insurable interest—Contract of indemnity—General and particular average—Fire insurance—Life insurance—Stock Exchange transactions, etc.—Agreements in restraint of trade—Rules as to consideration and reasonableness.

A. Void and Voidable Contracts.

Reality of Agreement.—We have seen that a contract is always based on agreement. But an apparent agreement is not always a real agreement. One party may be labouring under a mistake, or one party may have deceived the other party, or in some other way there may be no real consent. Subject to certain fixed conditions which we shall presently be investigating,

where there is no real agreement the law has three remedies. The law may treat the contract as of no effect, and it is then known technically as a void contract; or the law may give the party aggrieved the option of backing out of his bargain, and the contract is then technically called "voidable"; or, lastly, if the original position of the parties has been so altered as to make it impossible or undesirable to attempt to restore the parties to that position, then the law can compel the party at fault to pay damages to the other. The circumstances under which a contract, which is on its face complete and valid, is thus interfered with are usually classified under five headings: (1) Mistake, (2) misrepresentation, (3) fraud, (4) duress, and (5) undue influence. It will be sufficient for our purposes if we consider the first three of these classes. Mistake, if it affects a contract at all, makes it void. Misrepresentation and fraud, if they affect the contract, make it voidable.

Mistake.—It is open to a party to a contract to allege any one of the four following kinds of mistake as a reason for treating the contract as void:

1. A contract is void when one of the parties to it does not intend to enter into it, but through the fault of another, and without any fault of his own, makes a mistake as to the nature of the transaction.

Thus,[1] Foster was the holder in due course of a bill of exchange for £3,000, on the back of which the name of Mackinnon appeared. The bill was not met, and Foster sued Mackinnon as indorser of the bill, and in ordinary circumstances there could have been no defence. It appeared, however, that Mackinnon was an elderly gentleman, and some time before his indorsement had

[1] *Foster* v. *Mackinnon*, L.R., 4 C.P., 704.

signed a guarantee for £3,000 in order to enable a railway company to obtain an advance from their bankers. One, Callow, took the bill in question to Mackinnon, and asked him to put his name on it, telling him it was another guarantee. Callow only showed the back of the bill, and Mackinnon, in the belief that he was signing a guarantee, wrote his name on the bill. It was held that Mackinnon was not liable on the bill, as he had never really consented to be a party to it. The Court said: "It is invalid, not merely on the ground of fraud, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended."

2. A contract is void when the parties to it assume that a certain state of things exists which does not exist, and contract subject to that assumption. On this ground a contract to buy a cargo at sea which is no longer in existence has been held void, and also a contract for the purchase of an annuity on a life in the Colonies which, unknown to the contracting parties, had come to an end before the contract was made. In the first case the mistaken assumption was that the cargo was in existence, and in the second that the man was alive.

3. A contract is void when the parties to it, though apparently agreed, are not really so, because, in their ignorance of some fact, the contract means one thing to one and another thing to the other. Thus, where there happened to be two ships sailing from Bombay under the name *Peerless*, and the purchaser was buying the cargo of one ship and the vendor selling the cargo of the other, the contract was held void.

4. A contract is void when one of the parties makes a mistake as to the promise and the other party knows of the mistake, or any reasonable person in his position would know of the mistake. The mistake may be either as to the person with whom the bargain is made, or as to the bargain itself. This rule requires the most careful statement and attention. It may be stated thus: (*a*) If A and X are the contracting parties, and A thinks X is another person, M, and X knows that he is taken to be M, then A's contract with X is void. (*b*) If A and X are the contracting parties, and A thinks he is bargaining for thing P, whereas he is really getting thing Q, and X gives A thing Q, knowing all the time that A thinks the bargain is for thing P, then the contract between A and X is void.

Mere mistake as to the subject-matter of a contract does not invalidate it, but mistake of one party as to the promise of the other party as to the subject-matter, known to that other party, does invalidate the contract.

Examples: The case[1] where an order was sent to a shop, and carried out by the manager who had just bought the business, and who knew that the order was addressed to his late master (see p. 157), is an example in point.

The leading example[2] of a mistake as to the bargain arose out of a contract to buy oats. The purchaser refused to accept the oats on the ground that he intended and agreed to buy old oats, whereas those supplied by the vendor were new oats. The jury were told that if the vendor knew that the purchaser thought that he was buying old oats they ought to give a verdict for the purchaser. On appeal, the true question was held to

[1] *Boulton* v. *Jones*, 2 H. and N., 564.
[2] *Smith* v. *Hughes*, L.R., 6 Q.B., 595.

be this: "Did the purchaser think that the vendor's promise was to supply old oats, and did the vendor know that the purchaser thought that this was the promise, the vendor knowing all the time that he was promising nothing but new oats?" In other words, did the purchaser think that the bargain was for old oats, and did the vendor know of the purchaser's mistake for, if this was the case, then the contract was void.

Misrepresentation.—Misrepresentation may take place in two ways and be of two kinds. For instance, A may say something to X which is not true, or he may simply conceal something which X does not know, and ought to know. The first we shall call misstatement, and the second non-disclosure, but there is no essential difference between the two. Again, A may make a misstatement on purpose to deceive X. This is fraud, and will be dealt with under that heading. If, however, A's misstatement is made in an honest belief as to its truth, then it is not fraud, and the word "misrepresentation" is generally used, and will here be used, in that innocent sense.

The validity of ordinary contracts is not affected by innocent misrepresentation, unless the representation is itself a term in the contract, or creates an estoppel. Thus, suppose A, who is trying to sell a horse to B, of which A knows but little, says that it is quiet in harness, and honestly believes from what he has seen that such is the case. B says to A, "Will you warrant it to be quiet in harness?" A replies, "No, I will not." B buys the horse, which turns out not to be quiet in harness. The sale is valid, and B has no claim against A. There are, however, certain classes of contracts in which, from their very nature, one of the parties must look for his knowledge of the transaction to the statements of the

other party, and it is only fair that an innocent mistake under these circumstances should be a ground for allowing the person injured by such mistake to avoid the contract. These contracts are—(*a*) insurances, (*b*) contracts for the sale of land, (*c*) contracts for allotments of shares.

With regard to marine insurance, the law, as far back as 1766, was thus expressed:[1] "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured alone. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, or to induce him to estimate the risk as if it did not exist. But either party may be innocently silent as to grounds open to both to exercise their judgment upon."

The Marine Insurance Act, 1906 (sec. 17), enacts that a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Contracts for fire insurance and life insurance are on a similar footing. In proposals for life insurance it is usual to insert a special clause making the answers to a set of questions the basis of the contract. A mistake in the answers, whether intentional or unintentional, material or immaterial, will then vitiate the policy.

Sale of Land.—As regards the sale of land skilled advice should always be obtained, even in the drawing up of the preliminary contract.

Allotment of Shares in Companies.—The basis of

[1] *Carter* v. *Boehm*, 3 Burr., 1905.

applications for allotment of shares is generally a prospectus setting forth the objects and merits of the company. The issue of prospectuses is now largely regulated by statute; but, apart from statute, if there is a material misdescription in the prospectus of a company, and a person takes shares in the company on the strength of that misdescription, he has a right to rescind the contract, and escape from the liabilities of a shareholder's position. It does not matter that the misrepresentation was honestly made, and the person making it free from blame. "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."[1]

It is the duty of the party injured by a misrepresentation to make up his mind whether he will confirm or avoid the contract without unnecessary delay, or he may lose his right to rescind the contract; and in any event it must be remembered that the contract holds good until the injured party elects to avoid it.

Contracts of Guarantee.—In the case of a guarantee there is no positive duty to disclose all material facts, but fraud will be more easily presumed in the case of a

[1] *New Brunswick and Canada Railway Company* v. *Muggeridge*, 1 Dr. and Sm., at p. 381.

guarantee from the concealment of material facts than in other cases. The law on this point has been laid down in substance as follows: "When a creditor describes to a proposed surety the transaction proposed to be guaranteed, he is held to represent that the transaction in question has no special features making it different from other transactions of a similar character. If there is nothing in the transaction but what the surety might naturally expect, concealment does not vitiate it.

Examples: (1) A asks B to guarantee C's account at A's bank. B will know that most probably C has overdrawn his account with A, that being a feature generally present in guarantees of banking accounts. A accordingly need not tell B that C has overdrawn his account, and the concealment of that fact will not vitiate the contract. (2) A asks B to guarantee C's honesty. B will naturally expect that A is not employing a person whom he has already found to be dishonest. If A knows that C has already been dishonest in his service, and conceals the fact from B, B may avoid the contract on the ground that such concealment is really fraudulent.

Fraud.—Fraud is the representation either by words or conduct that something is true which is not so, so as to deceive another person, either intentionally or with reckless disregard as to the truth or falsehood of the words or conduct. It is immaterial whether the representation takes effect by false statement or concealment. Fraud that vitiates a contract is also sufficient ground for an action for damages, once known as an action of deceit. An action of deceit can be brought when the first five of the following characteristics are present. If the sixth characteristic is also present,

then the party to the contract who has been defrauded can avoid the contract as well as bring the action of deceit.

These characteristics are as follows:

1. The representation must be false.

2. The representation must be a representation of a fact, and not a mere expression of opinion.

3. The person making the representation must know that it is false, or make it with a reckless disregard of its truth or falsity.

4. The representation must be made with the object of inducing the party defrauded to act upon it.

5. The representation must in fact deceive.

6. The representation must be made by a party to the contract.

1. *The representation must be false.* If there is an actual false statement, the case is simple. If concealment is alleged, then it should be noticed that mere non-disclosure of material facts, however morally censurable, forms no ground for an action in the nature of an action for misrepresentation. There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

2. *The representation must be a representation of fact, and not a mere expression of opinion.* Thus, if A, who is about to sell a horse to B, says the horse is worth £50, that is A's opinion, and B need not accept it. But if A says, "I gave £50 for the horse last week," whereas, in fact, he gave £25 for it two years before, then A has misrepresented a fact; and if B has been induced by that to buy the horse, he may rescind the contract on the ground of fraud.

3. *There must be knowledge of the falsehood of the representation or a reckless disregard as to its being true or false.* Thus,[1] the directors of a tramway company between Plymouth and Devonport stated in their prospectus that they had power to work their trams by steam. As a matter of fact, they could not use steam without permission from the Board of Trade, and this permission had not been obtained, and was afterwards refused. It was, however, proved that the directors made their statement in the honest belief that it was true. It was held that a person who had bought shares on the faith of that statement in the prospectus had no remedy in an action of deceit against the directors, as their representation was not fraudulent, though it was false.

Where there is no honest belief in the truth of the assertion, it is immaterial that the underlying motive is honest. Thus, a bill drawn on A was accepted by B in A's name, and afterwards negotiated. B had no authority to accept, and knew that he had no authority, but intended to do A a service. It was held that a subsequent indorser, who had been made to pay the bill, could sue B in an action of deceit. The Court said, if B, when he wrote the acceptance, and thereby in substance represented that he had authority from A to make it, knew that he had no such authority, the representation was untrue to his knowledge, and the action will lie.

4. *The representation must be made with the object of inducing the party deceived to act upon it.* Thus, it has been held that a prospectus is intended to induce people to apply for shares in the company—and when it has accomplished that its work is exhausted—and is not

[1] *Derry* v. *Peek*, 14 A.C., 337.

generally issued to induce persons to buy shares in the open market. Therefore, a person who buys shares in the open market, though deceived by the prospectus, cannot bring an action against the directors for their fraudulent statement.

5. *The representation must in fact deceive.* If the person on whom the fraud was practised was not in reality deceived, then he is in just the same position as if no false representation had been made to him, and has no legal ground of complaint. Thus,[1] A bought a cannon of B. B knew the cannon had a defect which made it worthless, and so put a metal plug into the gun to conceal its weakness. A accepted the cannon without examining it. The gun burst before it was paid for, and A refused to pay on the ground that B had been guilty of fraud. It was held that, as A would have bought the gun even if no deceptive plug had been inserted, he was not in fact deceived by it, and was bound to pay.

6. *Rescission of contract.* A and B make a contract, induced by the fraudulent statement of C. A thereby suffers loss, and can sue C in an action of deceit if the five conditions which we have so far examined are fulfilled. But A cannot get off his bargain with B, because B is innocent. The technical term for the action by which A is released from his bargain with B is an action for rescission of the contract. If, however, B made the fraudulent statement, then there is no reason why A should not be released from his bargain with B; in other words, the representation must be made by a party to the contract, or the party deceived will not be able to rescind it. There is no necessity for A to rescind unless he so pleases, and he can make B pay him damages as

[1] *Horsfall* v. *Thomas*, 1 H. and C., 90.

compensation for the loss sustained. A must make up his mind as soon as he knows of the fraud, for if he afterwards treats the bargain as valid, his right to rescind will be lost. But in any case rescission is subject to two conditions—(*a*) that the subject-matter has not been so altered as to make it impossible to reinstate the parties; and (*b*) that innocent third parties have not acquired for value rights under the contract.

The Directors' Liability Act, 1890.—This statute is based on some novel principles, which can conveniently be noticed here. Where the Act applies, an action for damages will, in certain cases, lie for an untrue statement, although the person making the statement is not guilty of fraud. The Act contains no mention of fraud, nor does it in any way refer to the honesty or dishonesty of the person making the untrue statement. The Act applies to untrue statements made in a prospectus, either directly or by the incorporation in the prospectus of other documents. The person seeking redress must have subscribed for shares or debentures on the faith of such prospectus, and must have sustained loss or damage by reason of the untrue statement. A statement is untrue if it is misleading to those who read it, either through suppression of material facts or otherwise. But if the person making the statement can prove that he had reasonable ground to believe, and did up to the time of allotment believe, the statement to be true, that is a good defence. As to statements contained in reports of experts and similar documents, or based on them, it is a sufficient defence that the untrue statement is a correct and fair copy of, or extract from, the report. But this defence will not avail if it is proved that the person making the statement had no reasonable ground to believe that the author of the report was competent

to make it. We have used the phrase "person making the statement," but the Act makes liable, besides promoters who have taken part in the preparation of the prospectus, and those who have actually authorized the issue of the prospectus, any person who was a director of the company at the time of the issue of the prospectus, or who has authorized the naming of himself as a director, and is so named in the prospectus.

B. Lawful and Unlawful Contracts.

A contract may have been made with due observance of legal formalities, and may yet be unenforceable, because it is "unlawful." The only kinds of illegality with which we need concern ourselves are (*a*) wagers and (*b*) agreements in restraint of trade.

Contracts of the Nature of Wagers.—A wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event. The event may be uncertain either because it has not yet come to pass, or because it is not known to the parties. Thus, a bet may be made on the result of a boat-race which is to take place next week on the Thames, or on the result of a race in Australia which has already taken place, but the result of which is not known to the persons betting. Roughly speaking, wagering contracts are not enforceable at law, except as part of commercial transactions in which the parties have an interest. Every insurance contract depends on an uncertain event, and the law has laid down certain rules by which the benefits of insurances are restricted to persons who have a legitimate interest in the happening or non-happening of such event.

Marine Insurance.—The contract of marine insurance is a wager of the following description: The under-

writer bets that the ship insured will complete a defined voyage in safety, or proceed on its voyages for a definite period in safety, or that the cargo will be safely carried to its destination. The amount staked by the underwriter is the value of the ship or cargo, or a proportion of it; the amount staked by the person insured is known as the premium. Suppose A was to see in his daily paper that the steamship *City of Timbuctoo* was to sail for New York on the next day, and, although A had no interest in either ship or cargo, he was to propose to his friend X a bet of 1,000 to 1 that the vessel would reach New York in safety, and X accepted the bet; suppose, also, that on the same day, Y, the owner of the vessel, was to insure the voyage at Lloyd's at a premium of 2s. per £100; then there is no difference between the cases, either as to the uncertain event on which the bet is made—the safe arrival of the vessel at New York—or as to the odds laid. The first contract would not be enforceable at law, while the second is one of the commonest of commercial contracts. The distinction was laid down in a Statute of the year 1746, which enacted that all insurances on British ships, or merchandise laden on board such ships, should be void unless the person effecting the insurance is interested in the thing insured. The Marine Insurance Act, 1906 (sec. 4), lays down the general rule that every contract of marine insurance by way of gaming or wagering is void, and that a contract of marine insurance is deemed to be a gaming or wagering contract where the assured has not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest.

Insurable Interest.—Any person may be said to have an interest in the subject-matter of insurance who

may be injured by the risks to which the subject-matter is exposed, or would but for those risks have a certainty of advantage. Thus, the owner of a vessel runs a risk of losing his vessel, the charterer[1] of the vessel runs a risk of losing his freight, and the owner of the cargo of losing his goods and profit. All these persons are interested, because they all run a risk.

Contract of Indemnity.—There is a further restriction on the gambling element in the rule that the insured may only be insured to the extent of his interest. Thus, a man who sends £10 worth of goods to New York, even if he insures them for £1,000, in the hope that the vessel will be lost, can only in that event recover their actual value. From the fact that the underwriter[2] is only allowed to indemnify the insured from loss, the contract of marine insurance is known as a contract of indemnity. There is a partial exception to this which is allowed as a matter of convenience. It is permissible for the insured and the underwriter to agree upon a value of the subject-matter, and insert that in the policy, which is then known as a valued policy. If the subject-matter is totally lost, the agreed value is paid. But valued policies are not to be used as a cover for wagering, and therefore the interest of the insured must be a real *bonâ fide* interest, or the policy will be void. If the insured fraudulently overvalues his interest in order to cheat the underwriter, he will not be permitted to recover even for what he actually had on board.

[1] A man who hires the whole of a ship for the carriage of goods is said to "charter" the ship; his bargain is embodied in a "charter-party," and he is spoken of as the "charterer" of the vessel.

[2] The term "underwriter" is used as equivalent to "insurer. The name is derived from the position of the insurer's signature at the foot of the conditions agreed upon.

General and Particular Average.—From the peculiar conditions which obtain on board ship a compulsory sharing of losses in certain events takes place. For example, although A's cargo may arrive safely, he or his insurer may have to pay a share of the loss of B, whether B is another cargo-owner or the shipowner. The power of B to charge part of his loss to A is technically known as "general average." "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo comes within general average, and this must be borne proportionably by all who are interested." The Marine Insurance Act, 1906 (sec. 66), defines a general average loss as a loss caused by any extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure, and enacts that where there is a general average loss the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested. In contradistinction from the phrase "general average," the phrase "particular average" is used. It is an unnecessary phrase, as it really means that no exceptional rule is applicable to the case in point. Suppose a ship-master cuts away the mast necessarily, in order to save the ship. The loss of the shipowner is shared or averaged between the underwriters who have insured the ship and the underwriters who have insured the cargo. It is a case for "general average." Suppose, on the other hand, that a sail gets blown away, the loss will fall on the shipowner or his underwriters; or suppose part of the cargo gets damaged by sea-water, the loss will fall on the owner of the cargo or his underwriters. In other words, the loss is borne

by the person on whom it falls. It is not a case of "general average," but of "particular average," and there is no averaging of the loss. The word "average" has, in fact, lost its original meaning, and come to be almost equivalent to "loss." A marine policy covers claims for payment of "general average" as well as of "particular average" loss.

Fire Insurance.—Fire insurance does not differ in principle from marine insurance. The person insured must have an interest in the thing insured, and can only recover the amount of his actual loss. But fire insurance policies are never drawn by insurance companies to correspond with valued policies, and the sum on which the premium is paid only fixes the maximum which the insurer can be called upon to pay under any circumstances. Thus, if A insures a warehouse for £20,000, and damage is done by fire to the extent of £5,000, A can only recover £5,000. But if A makes a mistake as to the value of his warehouse, and finds that he cannot make good the damage for less than £25,000, still he can only recover £20,000 on the policy. The insurers are not responsible for the destruction caused by the fire, but for the loss actually falling on the insured. The following example[1] will explain this distinction: Bonner was the lessee of a house at Brighton, and under the lease he was bound to repair the house if injured by an explosion of gas. The Corporation of Brighton, by using a steam roller in the road, damaged a gas-pipe and caused gas to escape into the house, where the gas exploded and did considerable damage. The landlord received a sum of £750 under his policy of insurance. Afterwards Bonner received compensation from the Brighton Corporation, and reinstated the house according

[1] *Darrell* v. *Tibbitts*, 5 Q.B.D., 560.

to the terms of his lease. It was held that the insurance company could claim back the £750 paid to the landlord, as he had suffered no loss. The following rule was laid down: "A policy of fire insurance is a contract of indemnity, and upon payment of the amount of the loss, the insurer is entitled to be put in the place of the insured. If at a subsequent time the insured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the insured any sum which he may have received in excess of the loss actually sustained by him."

Life Insurance.—The wager involved in life insurance is of a somewhat different character. A house insured against fire may fall to pieces without being burnt down. A life insured against death is one day certain to meet with it, and if it is continuously insured the event insured against is bound to occur. If A insures his life with an insurance company for £100, and pays an annual premium of £3, the contract amounts to a bet by the company, at odds of 100 to 3, that A will live through the year, coupled with an undertaking to renew the bet for every succeeding year of A's life at the same odds. If A renews the bet continuously from year to year, he is bound in the end to receive the amount insured.

A contract of life insurance is not a contract of indemnity but it can only be made by a person who has an interest in the life insured, and to the extent of that interest. The interest of a man in his own life is unlimited. A creditor has an interest in the life of his debtor to the extent of his possible loss by the debtor's death. A wife has an unlimited interest in her husband's life.

As the contract is not one of indemnity, it is immaterial

that the risk of loss has disappeared before the happening of the event insured against. Thus,[1] A was entitled to £3,000 stock contingent upon his attaining the age of thirty. He sold his interest to one Law, who, to protect himself from possible loss by A's death before attaining thirty, proposed to effect a policy on A's life, A then being some twenty months under the age of thirty. The insurance company advised a policy for two years as sufficient to cover the risk, and Law took out such a policy. A attained the age of thirty, but died within the two years. It was held that Law was entitled to recover £3,000 on the policy, although he had already become entitled to A's legacy of £3,000.

Stock Exchange Transactions, etc.—Stock Exchange transactions are often practically nothing more than wagers on the price of stock and shares at the next settling day; but they are not now controlled by any special Act of Parliament, and as legitimate and illegitimate transactions are all made in the same form, they are practically untouched by the law as it stands. Of course, if the necessary evidence is forthcoming, the law will not enforce a transaction shown to be of a gambling nature to the knowledge of both parties. In the same way the purchase of raw material to be delivered at a future day, or the option to have such goods at a certain price at a future day, may be legitimate trade bargains or the wildest speculation, according to the actual circumstances of each particular case.

Agreements in restraint of Trade.—It has long been a principle of English law that it is for the good of the community that every one should be at liberty to use his skill, where, when, and how he likes. Contracts by

[1] *Low* v. *London Indisputable Life Assurance Company*, 24 L.J.Ch., 196.

which a man fetters his liberty in this direction are presumptively to the detriment of the general good, and the Courts are prepared to treat them as void. Thus, if a father were to bind his son not to enter various specified trades, the contract would be void even if under seal and supported by consideration paid by the father to the son. In practice there are exceptions, based on the necessities of modern commerce.

A good example of the nature of the exceptions is presented by a case[1] in which there was a double presumption against validity, for the person who had fettered his right of trading was an infant at the time, and we have seen that an infant cannot bind himself by a contract which is detrimental to his real interests. In this case an infant agreed, in consideration of being employed as a milk carrier, not to engage in business within a radius of five miles from his employer's business for two years after leaving the business. He left within a few days of his attaining his majority, and began selling milk within the prohibited area. The Judge said: "It is said that such a contract is not for the benefit of the infant who signs it. That argument is founded on a confusion of terms. It may be that such a contract is not so much for the benefit of the infant as a contract for employment would be without any restriction on his part; but that does not prevent a contract by which he gets employment, coupled with a bargain on his part that he will not compete after the service ceases, from being beneficial to the infant. I am of opinion that such a contract is very beneficial. The reason is, that if he is able to make such a bargain, he obtains the means of earning or continuing to earn his livelihood; he gets the employment which he would

[1] *Evans* v. *Ware*, 1893, 3 Ch., 502.

not otherwise obtain, or continue to have, without being subject to the restrictions."

In the case of the employment of agents (including partners) to whom trade secrets are entrusted, or to whom other important knowledge is necessarily imparted, or with whom customers come into frequent and personal communication, the employer is always exposed to the risk that the agent, after leaving his service, will be in a position to appropriate for himself what is really part of the employer's business. In other cases the value of a person's services may be much enhanced if the employer has a monopoly. Contracts in restraint of trade are allowable as part of a contract for service (including partnership agreements), so long as the restraint does not go beyond what is reasonable for the protection of the employer's interests. Such contracts do not merely benefit the servant, as stated in the infancy case cited above, but also make for the smooth and just working of businesses, and are therefore in no way detrimental to the community.

In the same way, on the sale of a business a vendor may bind himself not to compete with the purchaser, for by so doing he can obtain a higher price for himself, and can assure to the purchaser more absolutely the enjoyment of what he has bought.

Rules as to Consideration and Reasonableness.—It is sometimes stated as a guiding rule that there must be a consideration for the restraint even when the promise is made under seal, but this follows necessarily from the nature of the exceptional cases in which the restraint is allowed to be imposed. As in other cases the law will not inquire into the sufficiency of the consideration. For instance, if A promises not to carry on the profession of a dentist in Birmingham during the next

ten years if X will take A as an assistant at £100 per annum, the consideration which A receives in return for the restraint imposed upon him depends entirely upon the length of A's service. If A is subject to a week's notice he may serve for a very short period, but it is for A, and A only, to consider whether the consideration is adequate. A second rule is more important—viz., that the contract must be reasonable both as to space and time. In other words, the restraint must be limited to such a space, and must be only for such a time, as will be reasonably sufficient to carry out the intentions and objects of the parties. The character of a particular trade may justify a very wide restraint. In the case[1] of a business where the manufacture was that of Nordenfeldt Maxim guns, the customers for which were Governments in all parts of the world, it was held that a world-wide covenant was not too wide for the protection of the business from the competition of an ex-manager. It is not necessary that there should always be a limit of the contract as to time.

[1] *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, 1894, A.C., 535.

CHAPTER XIV

VARIOUS DISCHARGES OF CONTRACT

Breach of conditions—Conditional promises — Indivisible promises—Dependent promises—"Condition" or "Warranty"—Concurrent promises—Performance—Persons to demand and render performance—Exactitude—Impossibility of performance.

We have considered the making of contracts, and what circumstances may vitiate that making, and we now come naturally to what may happen when a valid contract has been made. No difficulties arise where the contract is fully performed, nor are there any serious difficulties when the contract consists of an absolute promise by A made to B for a consideration already received. In this latter case, if A does not fulfil his promise, B can sue him for damages for breach of contract. But between these simple cases lie several more complicated cases arising out of the fact that in several different ways a promise may be conditional and not absolute.

Conditional Promises.—A promise is conditional when its performance (*a*) does not become due until the happening of some event, certain or uncertain, or (*b*) ceases to be due on the happening of some event. In the former case we have what is called a condition

precedent, in the latter a condition subsequent. Sometimes the terms "suspensive" and "resolutive" are used. Where there is a suspensive condition performance is "suspended" until the happening of a particular event; where there is a resolutive condition performance is excused on the happening of the particular event. For example, X promises to pay A £50 as soon as A procures B's departure from the country. B's departure is a condition precedent to X's liability to pay A £50. Or suppose X promises to pay A £50, but if X procures B's departure from the country within a month, X is to be excused from payment. B's departure within the month is a condition subsequent which puts an end to X's liability.

The difficulties attending the subject of conditional promises result, not from any inherent difficulties, but from the fact that the parties to a contract very often fail to express their intention as to what is a condition. It is always open to the parties to a contract expressly to make any stipulation a condition, and then the position is quite clear. Thus, policies are often drawn "subject to the conditions herein contained, which shall be conditions precedent to the right on the part of —— to recover on this policy." In one case[1] as to a policy of guarantee for honesty one of the conditions was that the employer should, if required, use all diligence in prosecuting the employed to conviction. It was held that failure to prosecute when requested absolved the insuring company from paying the loss incurred. The Court said: "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will

[1] *London Guarantee Society* v. *Fearnley*, 5 A.C., 911.

be one." Where nothing has been said by either party as to conditions, yet the promise may under certain circumstances be construed as conditional. Where there is a representation or statement descriptive of the subject-matter of a contract, or of some material incident thereof, and intended to be a substantive part of the contract, the promise will be construed as conditional on the truth of the representation or statement. Thus,[1] where hops were sold by a grower to a hop merchant, with the statement that no sulphur had been used in their growth, the grower knowing that the brewers had objected to this, and it appeared that sulphur had been used for a small part of the hops which had been mixed with the rest of the hops, it was held that the merchant need not pay for the hops. His promise to pay was conditional on the truth of the representation as to the sulphur, and his liability to pay ceased on proof that the representation was untrue. So, where[2] there was a clause in a charter-party which ran thus, "The vessel to sail from England on or before the 4th of February then next," it was held that the promise in the charter-party to load the vessel with a cargo was discharged by the vessel not sailing before February 22. The sailing on the due date was a condition precedent to the performance of the promise to load the vessel.

So, again, where[3] the charter-party stated that the ship, *then in the port of Amsterdam*, should with all possible dispatch proceed direct to Newport for a cargo of coals, and as a matter of fact the vessel was not at Amsterdam, but some sixty miles off at Niewdiup, it was held that the promise to load was conditional on the truth of

[1] *Bannerman* v. *White*, 10 C.B.(N.S.), 844.
[2] *Glaholm* v. *Hays*, 2 M. and S., 257.
[3] *Behn* v. *Burness*, 3 B. and S., 751.

the statement as to the whereabouts of the vessel, and was therefore not binding.

Indivisible Promises.—As a rule a promise to pay money in return for services to be rendered or work to be done is conditional upon the service or work being completed. Where,[1] for instance, a mate engaged to serve at a given figure for a voyage and died before the completion of the voyage, it was held that his representatives were not entitled to any payment at all. So an artist who dies before he has completed a portrait is not entitled to his fee. In another case[2] A repaired three chandeliers for X, and sought to recover £5 for work done and materials used, and the charge itself was fair. X proved that when A accepted the job he expressly agreed to make the chandeliers complete for £10, which he had failed in doing. It was held that A could not recover, as the only promise X had made was a promise to pay £10 conditionally on the completion of the chandeliers. Where contracts are spread over a considerable time, and involve the use of material and the payment of wages, as, for instance, in contracts to erect buildings, it is usual to make express provision for payments on account. And in other cases where it may be presumed that the intention of the parties is that payment is to keep pace with the work done, the Court will give effect to the real intention of the parties.

The technical phrase for a promise which must be entirely performed before any claim on it can be made is "indivisible promise." Important questions sometimes arise as to whether buyers are bound to take part deliveries of goods, and these questions must be answered according to the facts of each particular case. In one case,

[1] *Cutler* v. *Powell*, 6 T.R., 320.
[2] *Sinclair* v. *Bowles*, 9 B. and C., 92.

where some thousands of quarters of Russian oats had been bought, "subject to shipment by steamer or steamers during February," the Court inferred that the shipment could be made in different parcels, and that the purchaser was bound to accept them if they came in time.

Dependent Promises.—Sometimes the performance of a promise by one party is conditional on the performance of one or more of the promises of the other party. The nature of the difficulties in this case can be best gathered from an example.[1] X promised to pay to A £150 per month from March 30, 1875, to July 13, 1875, in return for the following promises of A. (1) A was to sing as first tenor for X during that period. (2) A was not to sing anywhere during the year 1875 without X's permission. (3) A was to be in London without fail at least six days before March 30, for rehearsals. A was prevented by illness from fulfilling this last stipulation, but was ready and willing to carry out his other promises; nevertheless, X refused to carry out his promise. The Court held that the fulfilment of A's promise as to the rehearsals was not a condition precedent to X's liability to perform his promise, and laid down the following general rule. The question is not whether A is or is not liable in damages for failing to fulfil his part of the contract, but whether his failure justified X in refusing to proceed with the engagement. The answer to that question depends on whether this part of the contract is a condition precedent to X's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. In the absence of an express declaration, it is necessary to see whether the particular stipulation

[1] *Bettini* v. *Gye*, 1 Q.B.D., 183.

goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by A a thing different in substance from what X has stipulated for; or whether it merely partially affects it, and may be compensated for in damages. According as it is one or the other, it must be taken to be, or not to be intended to be, a condition precedent.

"*Condition*" *or* "*Warranty.*"—In the case of a sale of goods a stipulation the breach of which may give rise to a right to treat the contract as repudiated is called in the Sale of Goods Act, 1893, a "condition," while the term "warranty" is applied to a stipulation the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated. But there is no magic in the use of technical terms, and the Act proceeds to state that a stipulation may be a condition, though called a warranty in the contract.

Concurrent Promises.—In the case of sales (and in some other instances) the promises of each party are for the most part to be performed at the same time, and are called concurrent promises. "Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act." By the Sale of Goods Act, 1893, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.

Performance—Persons to demand and render Performance.—The person to demand performance is the party to whom the promise is made, even though the promise

is not made for the benefit of the promisee, but for the benefit of some third person. A promises B to give C £100. The person who can demand performance is B, and not C. A orders his banker by cheque to pay C £50. The banker makes a mistake as to A's assets, and refuses payment. The person to whom the banker is liable is A, and not C. In the same way the person who can perform the contract is the promisor.

Exactitude.—Performance, to discharge a contract, must be in strict accordance with the terms of the contract. Thus, it appeared[1] that X had taken a lease of a farm from A, and had agreed with A not to sell or carry away from the farm any hay, straw, or manure without A's consent. X removed certain quantities of hay and straw, and A thereupon sued X for breach of covenant. X's defence was that, in lieu of the hay and straw he removed, he brought back and spread upon the farm 2 tons at the least of good manure for every ton of hay and straw, and in lieu of manure removed he brought back better manure. It was held that, even admitting that X had by his action conferred on A a benefit greater than the observance of the covenant would have been, still, as X had no right to substitute a performance different from that promised, his defence was bad, and A must succeed in his action.

So by the Sale of Goods Act, 1893, where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them; and where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.

Impossibility of Performance.—Two parties may make

[1] *Leigh* v. *Little*, 6 H. and N., 165.

a promise which they both know to be impossible of performance. They are not likely to do this if the promise stands alone, but if it is one among many, the parties through carelessness or inattention may forget to cancel it. When parties make a promise of this nature, it seems obvious that there can be no intention of performing it on the one side, and no expectation of performance on the other, and so the law will discharge the promisor from liability for not performing his promise.[1] Thus, where a charter-party signed on March 15 contained a promise that the vessel should sail on or before February 12, it was held that the performance of that particular promise had been discharged.

Again, two parties may make a contract which they suppose to be capable of performance, but when the promisor comes to perform it he finds that performance is impossible, either from its being originally so, or from its having become such. In either case, if the promise is absolute, so that the parties may be taken to have intended in any case either performance or damages for non-performance, then impossibility of performance is no discharge. On the other hand, if it can be gathered from the contract that the parties intended performance to be conditional upon its being or remaining possible, then impossibility of performance acts as a discharge.

Thus,[2] where in a lease of a coalmine the lessee covenanted to pay 8d. a ton on 13,000 tons each year as fixed rent, whether he worked any coals or not, it was held that the exhaustion of the coal in six months was no defence to an action for the rent. The

[1] *Hall* v. *Cazenove*, 4 East., 477.

[2] *Marquis of Bute* v. *Thompson*, 13 M. and W., 487.

Court held that it could not import into the covenant a condition that there should be coals to that extent. But in the case[1] of a lease of some clay-pits the covenant was to dig and remove from the land not less than 1,000 tons and not more than 2,000 tons of clay, in each year, and the lessee was to pay a royalty of half a crown per ton. It turned out that there was not so much as 1,000 tons of clay in the pits, yet the lessor sued the lessee for a royalty of half a crown on 1,000 tons for the first year. There was no reservation of any rent to be paid in the event of clay not being found or raised. The Court came to the conclusion that here the covenant was a covenant to work out all the clay under the land in certain yearly amounts, and that this covenant was not broken by the lessee's failure to work clay if none was to be found there. A contrary decision would have given the lessor a fixed minimum rent, when he had not expressly stipulated for it.

In another case[2] the Court said: "When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract. And therefore if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."

Impossibility of performance often arises in cases of charter-parties, for nothing is less under control than winds or tides. But these risks can be, and ought to be, expressly provided for.

Where the performance depends on the continued existence of a given person or thing, a condition is

[1] *Lord Clifford* v. *Watts*, L.R., 5 C.P., 577.
[2] *Paradine* v. *Jane*, Aleyn, 26.

implied that impossibility of performance arising from the perishing of the person or thing shall excuse the performance. So where impossibility arises from an Act of the Legislature subsequent to the promise the promisor is excused. For instance, a covenant to leave land unbuilt upon is excused if the land is acquired compulsorily by a railway company and a railway-station built on it.

Where impossibility of performance has not been contemplated by the parties and provided for when they made their bargain, the best thing the Court can do is to ask what would have been the intentions of the parties as reasonable men if their attention had been drawn to the contingency. Thus, in the coalmine case, if the lessee had said to the lessor, "What is to happen if the coal becomes exhausted during my lease?" the Court thought it would have been reasonable and likely for the lessor to have said, "Oh, you must pay me my minimum rent," and for the lessee to have agreed. So in the clay-pit case the Court thought that a reasonable and likely answer to a similar question by the lessee would have been, "Oh, as soon as you have raised all the clay there is, you need not pay me any more royalty."

CHAPTER XV

BREACH OF CONTRACT, DAMAGES, ETC.

Actual and constructive breach—Partial repudiation—Discharge of right of action by—(1) *Accord and satisfaction;* (2) *release;* (3) *lapse of time;* (4) *judgment—Damages and special damages—Liquidated damages and penalties—Interest—Specific performance—Injunction.*

Actual and Constructive Breach.—We have already seen that a contract must be strictly performed according to its terms. Any defect in the performance of a contract is a breach of the contract, and gives rise to a right of action, with which we shall deal later on. But besides an actual breach there may also be what is sometimes termed a constructive breach of contract before the time for actual performance has arrived. This may take place in two ways—viz., (*a*) by the promisor doing an act which makes the performance of his promise impossible; or (*b*) by the promisor in some other way showing his intention not to perform his promise. Thus,[1] where A promised to assign to B within seven years from the date of the promise all his interest in four houses for £140, and before the end of the seven years assigned all his interest to another person, it was held that without waiting for the seven years to elapse B could sue A for breach of his promise.

[1] *Lovelock* v. *Franklyn*, 8 Q.B., 371.

In another case[1] a courier was engaged in April to accompany his employer on a tour for three months, to commence on June 1. On May 11 the employer wrote to the courier that he had changed his mind and declined his services, but refused to make him any compensation. On May 22 the courier brought his action for breach of contract, and the defence was that there could be no breach until June 1. It was held that the courier was entitled to treat the letter of May 11 as equivalent to a breach of contract.

Partial Repudiation.—Where the promisor has made more than one promise, or a divisible promise, his repudiation must either be of the whole contract, or of a part of it which is a condition precedent to the promisee's liability, else the promisee will not be entitled to treat such repudiation as equivalent to a breach of the whole contract. The question most usually arises in practice in the case of a contract for the sale of goods to be delivered by stated instalments. As to these contracts the Sale of Goods Act, 1893, enacts that "where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." Thus,[2] where the contract was to deliver loads of straw

[1] *Hochster* v. *De la Tour*, 2 E. and B., 678.

[2] *Withers* v. *Reynolds*, 2 B. and Ad., 882.

to be paid for on delivery, and after delivery of several loads the purchaser said he should always keep one load in hand, it was held that this was a repudiation of the whole contract, and there was no need to deliver any more loads. But in another case,[1] where 5,000 tons of steel were to be delivered in five monthly instalments, and the buyer refused to pay for the first two deliveries except on certain conditions, on the ground that a petition had been presented for winding up the vendor company, it was held that the vendors were wrong in treating this as a repudiation of the whole contract, and should have continued the monthly deliveries.

A constructive breach of contract does not give rise to a right of action, unless the promisee elects to treat it as equivalent to actual breach. Thus, instead of bringing an immediate action, as in the examples given, the promisee may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the promisor responsible for all the consequences of non-performance. But in that case the promisee keeps the contract alive for the benefit of the promisor as well as his own; he remains liable under it, and enables the promisor not only to complete the contract, in spite of the previous repudiation, but also to avail himself of any excuse for non-performance which may have come into existence before the time fixed for performance.

Discharge of Right of Action.—A breach of contract gives rise to a right of action, and this right of action can be discharged in four ways—(1) By accord and satisfaction; (2) by release; (3) by lapse of time; and (4) by judgment. A right of action cannot be discharged by the performance of the terms of the contract, or by

[1] *Mersey Steel Co.* v. *Naylor*, 9 A.C., 434.

any substituted payment or performance, without the consent of the person who has the right of action. If the person who has the right of action agrees to a payment or performance in satisfaction of his right, such agreement is called an accord, and the performance of it is called satisfaction. An accord without satisfaction is no answer to an action on the original claim.

A release, being gratuitous, must be under seal.

The claim for a debt or breach of contract may be barred by the Statutes of Limitation, which prescribe a certain limit of time from the vesting of the right of action within which the action must be commenced. An action founded upon breach of a simple contract must be brought within six years next after the cause of such action, and an action founded upon a contract under seal within twenty years next after the cause of such action. The Statute does not extinguish the claim: it only gives the person sued an absolute legal answer to the action, of which he may avail himself or not as he please. An executor may pay a statute-barred debt, and an unappropriated payment made to a creditor to whom several debts are due may be appropriated by him to a statute-barred debt. Where the cause of action arises from an actual debt, the liability of the debtor may be renewed so as to extend the period of limitation, either by a new promise to pay, which may be express or implied, or by a part payment. The acknowledgment or promise must be in writing, and signed by the party to be charged with it, or by his duly authorized agent.

Damages.—Damages are the money awarded to a person who has a right of action and successfully maintains it in a court of law. The measure of damages is the estimated loss directly and naturally resulting, in

the ordinary course of events, from the breach of contract. The reason for this rule is that these are the damages which a reasonable man would contemplate as the likely result of the breach if he had directed his mind to it. It is sometimes said that in certain cases the Courts will give special damages. By this is meant that if when a person enters into a contract he has notice of special circumstances which make special loss the likely result of the breach in the ordinary course of things, then upon his breaking his contract and the special loss following, he must make good the special loss. Here, again, the damages are what a reasonable man would contemplate as the likely result of the breach if he had directed his mind to it. Where goods have been sold, and there is an available market for them, the Sale of Goods Act, 1893, enacts that the measure of damages is *primâ facie* to be ascertained by assessing the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or delivered; or if no time was fixed for acceptance or delivery, then at the time of the refusal to accept or deliver.

Loss which would not arise in the usual course of things from a breach of contract, but which does arise from circumstances unknown to the person who has broken the contract, and peculiar to the special case, is not recoverable as damages.

Liquidated Damages and Penalties.—The parties to a contract may assess by express terms in their contract the sum to be paid in the event of a breach. Such a sum is called "liquidated damages," and may be sued for in case of breach without proof of the actual loss. Sometimes a sum of money is fixed without any special regard to probable loss, but sufficiently high to cover all

possible loss. In this case the sum so arrived at is known as a penalty. A penalty is not treated as an assessment of damages, and the Court will only allow the recovery of the damages actually incurred. As we have seen, penalties are usually inserted in bonds. The Court is not bound by the terms that parties choose to employ, and will treat a sum named as a penalty as liquidated damages, and *vice versâ* if the justice of the case requires it. A few general rules may be given: (1) Where the contract is for payment of a debt or a fixed money demand, and the sum agreed as damages is greater than the amount of the debt or demand, the sum will be treated as a penalty. (2) Where the stipulation for the payment of a fixed sum is made in respect of a matter of uncertain value, the sum will be treated as liquidated damages, and not as a penalty. A "valued policy," or the penalty clause for delay in a builder's contract, are examples. (3) Where a contract consists of several promises of various kinds, and one fixed sum is to be paid on the breach of any of the promises, such a sum will be regarded as a penalty, as it obviously cannot be an assessment of the loss arising from all possible breaches.

Interest.—Interest may be payable as a term of the contract, but we are concerned here with it as an element in damages. At common law interest is not allowed on money lent, or on the price of goods sold, or on a claim for work and labour. The following are examples: (1) A has a balance of £25 at his banker's. This is a loan to the banker, and does not carry interest without a special arrangement. (2) A sells goods to B at the price of £50, and gives him three months' credit. B does not pay at the end of that time. A waits another three months, and then sues B. A can only recover £50.

But the payment of interest can be indirectly secured by promising a rebate on the invoice price. Thus, if 5 per cent. discount is allowed for payment within a month, then after the month the full price may be demanded. (3) A works for B, and earns £20. A is kept waiting for his money for a month. A is not entitled to interest.

An exception to this rule occurs in the case of bills of exchange and promissory notes, on which, by mercantile usage, interest at 5 per cent. is allowed by way of damages from the maturity of the instrument.

By Statute, where a debt or certain sum is sued for, the jury may, if they shall think fit, allow interest to the creditor in two cases—viz., (1) Where the debt or certain sum is payable by virtue of a written instrument at a certain time; and (2) where the debt or certain sum is not so payable, but a demand of payment has been made in writing containing a notice to the debtor that interest will be claimed from the date of such demand until payment. In the first case the jury may award interest from the date when the debt is payable, and in the second case from the date of the demand of payment.

Specific Performance.—We have seen that damages will be awarded for any proved breach of contract. For the breach of some contracts damages are an inadequate compensation. Thus, suppose A is looking out for a country seat, and at last finds a suitable one for sale, and purchases it of B, who subsequently refuses to transfer it to A. No money that B can pay A will enable A to find a country seat of the same character and in the same situation. In such a case A may apply to the Court to force B to carry out his contract and convey the estate, and such an application is called an action for specific performance of the contract.

If B refuses to obey the order of the Court, he can be imprisoned for contempt, and a person can be appointed by the Court to execute the conveyance in his place.

An action for specific performance cannot be brought where the remedy by an action for damages is adequate. Thus, if A buys a ton of ordinary coal of B, and B refuses to deliver the coal, A can buy a ton of similar coal from C, and if he has to pay an increased price, he can get the difference in price from B, and that difference will be an adequate compensation to A.

The Sale of Goods Act, 1893, enacts that in any action for breach of contract to deliver specific[1] or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. In one case the subject of sale was some wool which had been imported from California, and was therefore capable of export to America free of duty. The seller repudiated the contract. On the purchaser showing that there was no wool of similar character in the market, the Court declared him entitled to an injunction restraining the vendor from dealing with the wool, otherwise than by delivering it to the purchaser according to the terms of the contract.

Injunction.—An injunction is a mode of securing the specific performance of the negative terms of a contract. Thus, A promises to sing for B for ten nights in a month, and to sing for no one else during that month. For obvious reasons the Court will not decree specific performance of A's promise to sing, but it will at B's

[1] "Specific goods" mean goods identified and agreed upon at the time a contract of sale is made.

request issue an injunction forbidding B to sing for any person but A during the month in question.

Judgment Debts.—The various ways of enforcing judgments, by execution and sale of the debtor's goods, by "garnishing" his debts, by issue of a bankruptcy notice, etc., do not fall within the province of this book.

CHAPTER XVI

REAL AND PERSONAL PROPERTY

Land in feudal times—Tenancy for life—Tenancy in tail—Tenancy in fee simple—Personal interests in land—Legal differences—Rules as to inheritance—Family settlements.

THERE is no distinction which is harder for the layman to grasp than that between real and personal property. Very roughly, all property that has no connexion with land is personal property, and all real property has some connexion with land, but beyond this it is impossible to generalize succinctly. Some foreign systems of law distinguish between movable and immovable property, but that is not the criterion in England. The position would be comparatively simple if the distinction between real and personal property were merely that of land and not land. It is possible for interests in land which are personal property to approach very nearly both in character and legal effect to some of the interests in land which are real property. Thus, a lease of land for 999 years held at a yearly ground rent of £50 is personal property, while land held in perpetuity subject to the payment of a chief rent (defined below) of £50 a year is real property. With a little ingenuity the incidents attaching to the tenure of the land in both cases may be made almost identical, and financially the value of the land

may be the same, and yet, because the interest in the land is in the one case personal property, and in the other real property, the law applicable to those interests is on two or three points widely divergent.

Land in Feudal Times.—The cause of this divergence is historical, and no adequate explanation can be given of it without some historical statement. Our real property law is still inexplicable without reference to its origin in feudal times. The holding or tenure of land in those times had a definite political object, and roughly the rule was this: So much land, so much obligation to military and state service. It was, therefore, far more essential that some one should always be in possession of the land who could perform these obligations, than that the holding of land should be governed by laws which make for agricultural or commercial convenience. Primogeniture (or the succession of the first-born son to the exclusion of the rest of the family) was defensible in feudal times on political grounds, as was the preference of males to females in the succession to land, while the economic side of the question was of little or no importance. Some of these rules of law which had their origin in feudal times survive to-day, and it is to them we must look for an explanation of the distinction between land as real property and land as personal property. "It may be said generally that those interests in land which were never recognized in the feudal system are, however large and important, considered as personal property; while, on the other hand, many interests ranked as real property which are only remotely connected with land, such as a clergyman's tithes, the right of presentation to a benefice, the title-deeds of a landed estate, a peerage or other title of honour originally connected with a particular locality." Without going into any sort of

explanation of the growth of feudal tenures, we may say that there emerged from the feudal system three main tenancies or holdings of land—viz., tenancy for life, tenancy in tail, and tenancy in fee simple. Of leases we shall have something to say later on.

Tenancy for Life.—A man may own a thing for his life under an obligation to leave it intact at his death, and without any power of disposing of it either by sale or gift in his lifetime or by will after his death. He enjoys the income without power to dispose of what brings in the income. Such an interest in property is called a life interest, or in the case of land tenancy for life. In essence the conception of a life tenancy in land is simpler and more primitive than that of absolute ownership on modern lines, because in a very simple agricultural society, while enjoyment and occupation naturally last for a lifetime only, no one thinks of disposing of the land itself to strangers, or of specially regulating its descent in the family after death. The occupier lives on his land and by his land, and when he dies his connexion with it comes to an end.

In modern society difficult questions have arisen as to what a tenant for life may consume, and what he must leave for his successors—as, for instance, whether he may cut timber or open mines—but the distinction between a tenant for life and a full owner is in its broad outlines fairly clear.

Tenancy in Tail.—The gift of land to a man is in a primitive society a gift to him for his life, with the undefined idea that some member of his family will naturally step into his place at his death. Early in feudal times we meet with definite gifts to a man and the heirs of his body, or the heirs male of his body, and these gifts meant what they literally said—namely, that

the estate was to be held by the donee for his life, and after that by the donee's eldest son for his life, and so on till all the decendants, or male descendants, as the case might be, were exhausted, when the estate reverted to the donor. The technical name for this succession of life estates during the perpetuation of a particular family is called an "entail." A gift or conveyance of land to A and the heirs male of his body makes A a tenant in tail male of the land, and such a conveyance is valid to-day, and under it the land *can* pass, without any further will or disposition by A, to B, his eldest son, and on B's death to C, his eldest son, and so on till all the male descendants of A are exhausted, and, in fact, *will* so pass unless some tenant in tail takes measures, to be explained hereafter, to alter the course of the devolution of the land. As a matter of fact, the chance is almost infinitesimal that the land will go for more than one generation without the entail being "barred." Some centuries ago it was found very inconvenient to have land compulsorily tied up to a particular family for an indefinite number of generations, so an elaborate process was concocted for putting an end to the entail (technically "barring the entail"), and turning the estate into a tenancy in fee simple, which carries with it full powers of disposition, both by deed in a man's lifetime and by will after his death. It is therefore no longer the rule that entailed land *must* pass from father to son, and the elaborate process originally necessary for barring an entail is now represented by the execution and enrolment of a disentailing deed.

We have seen that an entail is a succession of life interests in a particular family, so that if a grandfather, son, and grandson are all alive together, there may be three tenants in tail alive at one and the same time. As we shall

see when we come to explain the essential features of a "settlement," there is usually a life interest pure and simple in front of the first tenancy in tail. A tenant in tail who is not actually in possession of the estate has not the same power of barring the entail as has a tenant in tail in possession. A tenant in tail in possession, by barring the entail, puts an end not merely to the claims of his own descendants, but also to the claims of the collateral claimants, and creates in himself an estate in fee simple. Thus, if A, first tenant in tail male, has two sons, B and M, and B has an only son, C, and M has as only son, N, then C, when tenant in tail in possession, can defeat the claims not only of his heirs, but of his uncle M and cousin N and their male descendants, who would become tenants in tail on the failure of C's male descendants. If, however, C bars the entail in the lifetime of his father B, the tenant in tail in possession, and without his consent, then C only cuts off the rights of his own male descendants, and leaves the claims of M and N and their male descendants unaffected. This right of C to dispose of the land for his own lifetime and for the lives of his male descendants is called "a base fee," and, as may be gathered from a little reflection, is of a very precarious and uncertain value. If C is a bachelor, it may be of no more value than C's life estate; if C has ten healthy sons, it may be almost as valuable as a fee simple. Where there is a life estate in front of the first tenancy in tail, the tenant in tail cannot create more than a base fee without the consent of the life tenant, who is sometimes spoken of as "protector of the settlement," for reasons which will appear when we explain how landed estates are kept "settled" from generation to generation.

Tenancy in Fee Simple.—Tenancy in fee simple ap-

proached very near to absolute ownership, and involved the power of gift and sale during the owner's life, and, during recent centuries, of disposition by his will. In some cases the tenant in fee simple recognized the overlordship of his grantor by the payment of a small rent (sometimes called a "quit rent"), or by a payment in kind or in service, and the practical point for modern times is that the payment of a rent is not inconsistent with an estate in fee simple. About a hundred years ago it became the custom in Lancashire and some other parts of the North of England, when land held in fee simple was disposed of, for the owner to reserve to himself a rent in perpetuity to be payable out of the land, and in such cases it was held that both the rent and the land out of which it was payable were real estate, and could be held in fee simple or for life or in tail, just as land could be that was unencumbered with rent. Such rents are called "chief rents," and must be distinguished from rents payable under leases, which are always for a definite number of years, even though the number is 999 years, and eventually cease to be payable.

These three interests in land—life tenancies, tenancies in tail, and tenancies in fee simple—are real estate or real property, and are contrasted in English law with personal estate or personal property.

Personal Interests in Land.—We must now examine what interests in land are treated as personal property. These interests are sometimes called "chattel" interests in land, or chattels real. Society was in these early times military and agricultural, but agriculture was left to be carried on by serfs. Practically, property consisted of land and cattle, and as distinguished from land a man had goods and chattels (a word with the same derivation as "cattle"). There were certain insignificant

interests in land which were agricultural and not military in their origin, and these were chattel interests, and along with goods and chattels were regarded as personal property, and not real property.

Chattel interests in land are leases or tenancies for defined periods of time—generally years, but sometimes months or weeks. Apparently, the original chattel interest in land was a yearly tenancy, with the rent payable after harvest-time, and this was the only leasehold interest known till comparatively modern times. We may regard a commercial lease as a recent invention. In the first place, agriculture was carried on either by yeomen farmers (free tenants or copyholders[1] of the manor), farming, for the most part, the common fields of the manor, or by the lord's villeins, who tilled his immediate demesne[2] under the direction of the farm bailiff. When the tenant farmer emerged, he seems to have taken land on lease for lives, and not for years. Up till quite recent times the agricultural lands held by the colleges of Oxford and Cambridge were let on leases for three lives, with a heavy premium for renewal when the last of the lives fell in. Such leases are, of course, real property, and not personal property. The present writer not long ago heard of an old cottager in Cornwall who held his cottage on a lease for lives, of which his own life was the last. Ultimately a twenty-one years' agricultural lease at a rack rent became common.

Again, commerce as distinct from farming did not lead to the creation of leaseholds till recent times. The milling trade was, in feudal times, in the hands of the lord of

[1] A copyholder has his title recorded on the rolls of the manor, and holds by "copy of court roll."

[2] The same word as the more familiar "domain."

the manor, who could compel the tenants of the manor to grind at the manorial mill, and where markets were established they belonged to the lord of the manor unless and until he sold his rights.

In the towns the traders were small free tenants, who bought various trading privileges of the lords of the manor, and carried on their trades in the houses in which they lived, and which, for the most part, they owned. They were what we should now call "little masters." In London, no doubt, some people grew to be rich merchants, but they were not important as occupiers of land. Where the traders did not succeed in establishing their civic independence, they remained very dependent on the lord of the manor. For instance, at Sheffield, which, in spite of its early trade in cutlery, remained apparently a manorial village, the control of the cutlery trade remained in the hands of the lords of the manor, who were great nobles, and actually resided at Sheffield Castle and Manor up to the beginning of the seventeenth century. The streams round Sheffield were dotted with grinding-wheels, but they were the property of the lord of the manor, and the trade customs, though settled by the cutlers themselves, were settled in the manorial court, with the lord's steward in the chair, while the lord of the manor took the fines that were imposed for breaches of trade rules.

We may therefore say that in the Middle Ages commerce had got no hold on the land of England, save in a few towns which cast off the feudal yoke at an early period, and even in these towns the requirements of commerce were small, and were met by ownership rather than tenancy. Yearly tenancies were known, but were of no importance either socially or commercially, and it was from this insignificance that a holding for

years was excepted from the rules of real property law.

The development of leases came, apparently, with the Industrial Revolution of the eighteenth century. There is evidence that a 99 years' building lease had not been definitely settled in its present form in the year 1805. Leases for longer periods extending up to 999 years are an invention of the commercial men of the North of England. Many of these leases are exceedingly valuable, but value is not now the criterion between real and personal interests in land. As these leases are of the nature of a tenancy for a year, which was only a chattel interest in land, they also are chattel interests in land. Real property, therefore, comprises the older interests in land, such as estates for life, estates in tail, and estates in fee simple, and certain more modern forms, such as chief rents and land subject to chief rents, which are modern adaptations of old incidents of land holding. Chattel interests in land are personal property, and comprise all forms of leases and tenancies for fixed periods, from leases for a thousand years down to weekly tenancies.

Legal Differences—Rules as to Inheritance.—What are the main differences between the legal incidents attaching to real and personal property? We need only concern ourselves with two—(*a*) differences in the rules of inheritance; and (*b*) the power to entail real property. Seventy years ago we should have had to add some very complex distinctions about the payment of debts, and before the passing of the Land Transfer Act, 1900, a deceased man's executors as such, or his administrator, had no interest in the real estate. Now the executors or administrator take real as well as personal estate, but after the discharge of the deceased's debts the real estate

is held in trust on an intestacy for the persons entitled thereto, according to the rules of inheritance applicable to real property. In the case of a man dying intestate (*i.e.*, without a will), the rule of primogeniture or the heirship of the eldest son applies to real property, while as regards personal property the children, male and female, all take equally. The interest taken by the widow also differs. This divergence may lead to a very arbitrary division of property, and, where buildings are erected, as is sometimes the case, partly on freehold and partly on leasehold land, to a very curious position, from the legal standpoint. But by carefulness in preparing a will these inconveniences may be averted.

Family Settlements.—The survival of the power of creating estates tail in real property is much more serious from a commercial standpoint, as it has led to the bulk of the land of England being held in what is called "strict settlement." In fact, the rules which were instituted for military and political reasons were found, when feudalism decayed, to be admirably adapted for keeping estates together and maintaining the social prestige of what we now call the county families. The feudal tenures were formally abolished at the Restoration, and it was in the seventeenth century that Sir Orlando Bridgeman and other conveyancers worked out the modern form of a strict settlement.

The following account of a strict settlement is taken from "A Century of Law Reform," as being the most concise account known to the writer, and, with the explanations already given, should be intelligible to the reader: "Speaking broadly, the general framework of a strict settlement of land is as follows: The settlor conveys it to the use of himself for life, and, after his death, to the use that his widow may receive a rent-

charge, or jointure, as it is called. Subject to these life interests he gives it to the use of trustees for a long term of years (500 or 1,000) upon trust to raise by mortgage of that term a specified sum of money for the portions of his younger children, and subject thereto to the use of his first and other sons successively and the heirs male of their bodies, with an ultimate remainder, in default of issue, to the settlor himself in fee simple."

It will be seen that on the face of it such a settlement merely ties up the property during the settlor's life; for upon his death his eldest son as first tenant in tail can by a simple enrolled deed convert his estate tail into a fee simple, and by paying the portions of his younger brothers and sisters make himself the absolute owner of the property.

There is no certain method of avoiding this, because the law does not permit property to be settled by way of remainder on the unborn child of an unborn child, or by way of trust beyond a life or lives in being and twenty-one years afterwards.

In practice, however, the property is rarely permitted to go out of settlement, for directly an eldest son comes of age he is induced, like some latter-day Esau, to sell his birthright for a financial mess of pottage.

The alternative is gently placed before him: do your duty to the family by surrendering your future estate tail, receiving instead a future life estate and a present handsome allowance, or remain during your father's lifetime without funds. Practically, even if family pride did not compel him to consent willingly, he would have to submit, because during his father's lifetime he can only convert his estate tail into a base fee, which is scarcely negotiable for purposes of mortgage. He therefore yields. He and his father disentail the

property, and then resettle it, giving a life estate to the son on the father's death, and an estate in tail male to *his* sons successively. When he marries and his eldest son comes of age, the same ingenious process is repeated. The system of strict settlement, in short, depends upon providing, by means of constant resettlements, that no person of full age shall be entitled to a greater estate than an estate for life.

Personal property cannot be tied up in strict settlement, for personal property cannot be entailed, and when settled, as it sometimes is, upon trusts corresponding as nearly as possible to the limitations of settled real estate, the first tenant in tail takes a vested reversionary interest in the personal property. This reversionary interest is a perfectly good security, on which an insurance company will advance money at a low rate of interest, and an eldest son entitled in reversion to personal property cannot be subjected to financial pressure as a tenant in tail in reversion can be. When, therefore, the wealthy manufacturers of Lancashire took land on a 999 years' lease, they at any rate accomplished this, that they put it out of the power of the holder of the lease, however valuable it might become, to entail it and subject it to the incidents of a more or less perpetual family settlement.

There is no doubt that the locking up of land in this way, so that only a small fraction of the land of England is in the hands of persons with power to dispose of it absolutely, might be a very serious menace to the commerce and business of the country, and this has been fully recognized; but the danger has been met, not by curtailing powers of settlement, but by giving tenants for life almost as large powers of sale (under the Settled Land Acts) as owners in fee simple, and attach-

ing the settlement to the proceeds of sale instead of to the land sold. There is one danger to the community which is not met by this device. You will have noticed that part of the family settlement was a power to mortgage for the portions of younger brothers and sisters. If this mortgaging is continued generation after generation, the income of the head of the family may dwindle almost to nothing. Some large landowners are, in fact, almost penniless. This is, of course, bad for the farms on the estate, which will be stinted by the landowner, instead of being generously looked after.

APPENDIX[1]

LIMITED PARTNERSHIPS ACT, 1907

THIS Act comes into force on January 1, 1908. The first point for the reader to note is that the limitation of liability conferred by the Act is entirely different in scope, though very similar in nature, to that constituted by the Companies Act and that the title is to some extent a misnomer. The Act does not create limited partnerships in the sense that the Companies Acts create limited companies. The Act leaves untouched the principle of unlimited liability for debts as regards partnerships, but where one or more persons are responsible to an unlimited degree for the debts of the partnership, the Act enables a new class of partners to be added whose liability is limited. It is an Act for creating partners, but not partnerships, with limited liability.

Sec. 4 of the Act enacts that "A limited partnership must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm." These general partners are in exactly the same position as ordinary partners under the general

[1] This appendix was drawn up from the Bill as passed by the House of Commons, and amended by the House of Lords.

law of the land as explained in Chapter V. Sec. 4 of the Act proceeds to enact that a limited partnership must also contain "one or more persons, to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital, or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed."

A limited partner brings in a definite and limited sum as capital, either in cash or in property, and his liability is at an end when he has contributed the agreed amount. He is therefore very much in the position of a fully paid shareholder. On the same analogy his share capital must not be returned to him during the partnership, for sec. 4 further enacts that "a limited partner shall not during the continuance of the partnership draw out or receive back any part of his contribution, and if he does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back." A limited partner must not take part in the management of the partnership business, and has no power to bind the firm; but he has the right to inspect the books of the firm, and to examine into the state and prospects of the partnership business, and he may advise with his partners thereon. If a limited partner takes part in the management of the partnership business he is liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner. A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee becomes a limited partner with all the rights of the assignor.

The nature of a limited partner is fully contained in the enactments that have been quoted. The rest of the Act gives the conditions under which a limited partner can come into being. The principal conditions are as follows:

(*a*) Every limited partnership must be registered as such in accordance with the provisions of the Act.

(*b*) Registration is effected by sending to the Registrar a copy of the partnership agreement and a statement containing the following particulars:

(1) The firm name.

(2) The general nature of the business.

(3) The principal place of business.

(4) The full name of each partner.

(5) The term for which the partnership is entered into, and the date of its commencement.

(6) A statement that the partnership is limited, and the description of every limited partner as such.

(7) The sum contributed by each limited partner, and whether paid in cash or how otherwise.

The statement as to a limited partner's contribution is chargeable with a stamp duty of five shillings per £100 on the sum mentioned in it. The Registrar of Joint-Stock Companies is to be the Registrar of Limited Partnerships, and statements filed with him can be inspected and copied on payment of prescribed fees.

It is impossible to give any forecast as to the utility of the Act. The position of a creditor of a partnership who is entitled to a share of profits is not an enviable one, and such creditors will now, in all probability, completely disappear and give place to "limited partners." On the other hand, so many partnerships are now turned into private companies that the number of trading partnerships requiring outside capital (as

distinct from loans on security) may not be very large.

The experiment is interesting, and under the provisions of the Act the creditors of a limited partnership have ample notice of all the material facts, and should be in a safer position than the creditors of a limited company which has issued debentures by way of floating security.

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